

(22,860.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 784.

SOUTHERN PACIFIC COMPANY AND OREGON & CALIFORNIA RAILROAD COMPANY, APPELLANTS,

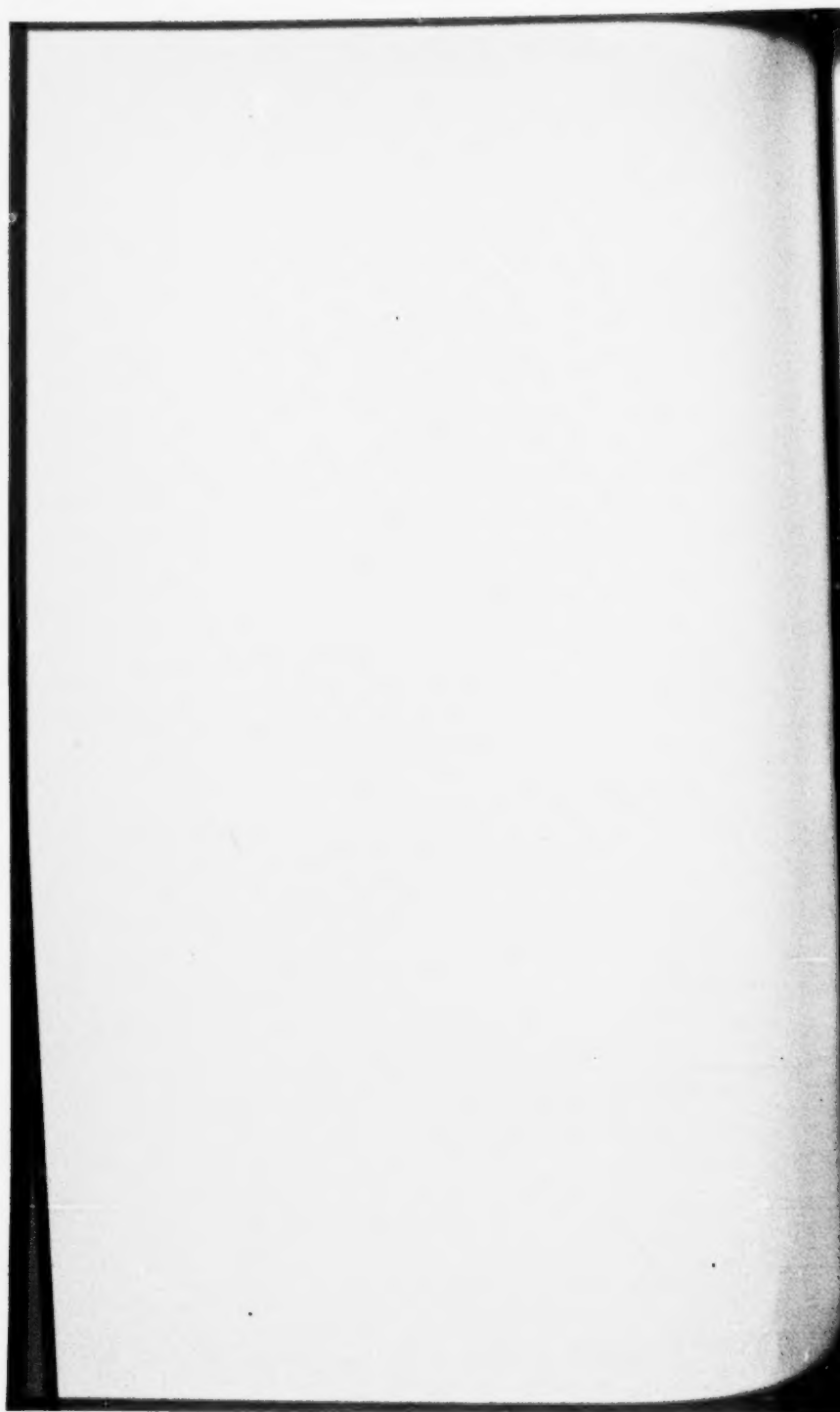
vs.

THOMAS K. CAMPBELL, CLYDE B. AITCHISON, AND FRANK J. MILLER, COMMISSIONERS CONSTITUTING "RAILROAD COMMISSION OF OREGON," AND A. M. CRAWFORD, ATTORNEY GENERAL OF THE STATE OF OREGON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

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Citation on Appeal.

UNITED STATES OF AMERICA,
District of Oregon, ss:

To Thomas K. Campbell, Clyde B. Aitchison, Frank J. Miller, Commissioners constituting "Railroad Commission of Oregon," and A. M. Crawford, Attorney General of the State of Oregon, Greeting:

Whereas, Southern Pacific Company and Oregon & California Railroad Company, have lately appealed to the Supreme Court of the United States from a decree rendered in the Circuit Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within sixty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 28th day of July, in the year of our Lord, one thousand, nine hundred and eleven.

A. S. BEAN, *Judge.*

[Endorsed:] No. 3675. United States Circuit Court, District of Oregon. Oregon and California Railroad Company and Southern Pacific Company vs. Thomas K. Campbell, Clyde B. Aitchison and Frank J. Miller, Commissioners constituting "Railroad Commission of Oregon." Citation on Appeal. Filed July 29, 1911. G. H. Marsh, Clerk. By ———, Deputy Clerk.

STATE AND DISTRICT OF OREGON,
County of Multnomah, ss:

Due service of the within citation on appeal is hereby admitted to have been made upon the said Thomas K. Campbell Clyde B. Aitchison and Frank J. Miller, Commissioners constituting Railroad Commission of Oregon, and A. M. Crawford, Attorney General of the State of Oregon, defendants in said suit, and upon us as their solicitors of record, within said State, county and district on this 28th day of July, A. D. 1911, by receiving a copy thereof certified to by Wm. D. Fenton, one of the solicitors for plaintiffs.

Dated at Portland, Oregon, July 29, 1911.

JOSEPH N. TEAL,
Solicitors for said Defendants.

- 2 In the Circuit Court of the United States for the District of Oregon, October Term, 1910.

Be it remembered, That on the 12th day of October, 1910, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill of Complaint in words and figures as follows, to wit:

- 3 In the Circuit Court of the United States for the District of Oregon.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Complainants,

vs.

THOMAS K. CAMPBELL, CLYDE B. AITCHISON, OSWALD WEST, Commissioners Constituting "Railroad Commission of Oregon," and A. M. Crawford, Attorney General of the State of Oregon, Defendants.

Bill of Complaint.

To the Honorable the Judges of the United States Circuit Court for the District of Oregon:

Your orators, Southern Pacific Company, a corporation organized under the laws of the State of Kentucky, and a resident and citizen of said state, and Oregon & California Railroad Company, a corporation organized under the laws of the State of Oregon, and a resident and citizen of said state, bring this, their Bill of Complaint against Thomas K. Campbell, Clyde B. Aitchison, and Oswald West, Commissioners constituting "Railroad Commission of Oregon," and A. M. Crawford, as Attorney General of the State of Oregon, each of whom is a citizen and resident of the State of Oregon, and residing in the District of Oregon and within the jurisdiction of this court, and thereupon your orators show and allege the following facts, to-wit:

I.

- 4 Your orator Southern Pacific Company is now and during all the times hereinafter named has been a corporation duly organized and incorporated under the laws of the State of Kentucky and a citizen of said state, but having an office and place of business at Portland, in the State of Oregon, and duly authorized by law to transact business in the State of Oregon, and as such engaged in the business of a common carrier of passengers and freight for hire over its lines of railways in the states of Oregon, California, and other states and territories of the United States, and as such engaged in intra-state and inter-state commerce, and as such is the lessee in possession and engaged in the operation of those certain lines of railway of the Oregon & California Railroad Company within the State of Oregon hereinafter more particularly described.

II.

That the complainant Oregon & California Railroad Company is now and during all the times hereinafter named has been a corporation duly organized and existing under the laws of the State of Oregon and a citizen of said state, but having an office and principal place of business at Portland, in the State of Oregon, and duly authorized by law to transact business in the State of Oregon, and as such heretofore duly authorized to lease to Southern Pacific Company all of its lines of railway, depots, stations and terminals, rolling stock and other property belonging to its system of railways within the State of Oregon hereinafter more particularly described.

III.

That the defendants Thomas K. Campbell, Clyde B. Aitchison, and Oswald West, during all the times hereinafter named, have been and now are the duly appointed, acting and qualified railroad commissioners of the State of Oregon, and as such known collectively as "Railroad Commission of Oregon," and each, during all the times hereinafter named, has been and now is a citizen of the State of Oregon; and that the defendant A. M. Crawford, during all the times hereinafter named, has been and now is the Attorney General of the State of Oregon, and a citizen of said state; and each of the said defendants resides within said state, and within the jurisdiction of this court.

IV.

That on the 1st day of July, 1887, the Southern Pacific Company and the Oregon & California Railroad Company, being thereunto duly authorized by an Act of the Legislative Assembly of the State of Oregon approved February 16, 1887, duly made and entered into a written lease by the terms of which the Oregon & California Railroad Company leased to the said Southern Pacific Company for the term of forty years from that date, all of its railroad situate in the State of Oregon, known and designated as the "Oregon & California Railroad," with all its branches, together with the rolling stock, telegraph lines, tools, and property of every kind and nature whatsoever in use upon or in connection with the said railroad, together with all the branches thereunto belonging, and that thereafter, from time to time, said lease has been so modified as to cover and include additional mileage from time to time acquired or added to said property, so that at the date of the order of the Railroad Commission of Oregon, hereinafter set out, said Southern Pacific Company was in the possession of and operating as a common carrier for hire, under said lease and amendments thereto, all the railroad, rolling stock, depot grounds, stations, and terminals of the Oregon & California Railroad Company within the State of Oregon, and more generally described as follows:

6	Mileage between Portland and the California state line, main line, consisting of approximately....	363 miles
	Mileage from Portland to Corvallis, West Side Division, consisting of.....	97 "
	Mileage from Portland to Airlie, Yamhill Division....	80 "
	Branch,—Sheridan Junction to Sheridan.....	7 "
	Woodburn—Springfield Branch, including Woodburn to Natron	93 "
	Wendling Branch—Springfield to Wendling.....	17 "
	Lebanon Branch—Albany to Lebanon.....	13 "
		<hr/> 670 "

together with the stations and terminals and appurtenances belonging to said lines of railroad, and all of the total value of \$43,594,886.73.

V.

That heretofore, and at the regular legislative session held in the year 1907, the legislative assembly of the State of Oregon undertook to pass an act entitled "An Act to regulate transportation and commerce, and common carriers thereof in this State, and for that purpose, to create a Railroad Commission of Oregon, to provide for the appointment and election thereof, to fix the qualifications, salaries, powers and duties of said Commission, and the members thereof, and authorizing them to make and alter their rules and regulations, and to provide for demurrage and reciprocal demurrage, and for penalties for failure to furnish cars, and to regulate the mode and manner of establishing, making and maintaining railroad crossings and connections, and to prevent unjust rates being imposed, and unjust discrimination by the carriers subject to this Act, and to insure adequate service by them, prescribing penalties for the violation of the provisions of this Act, prescribing the procedure and rules of evidence in relation thereto, making an appropriation to carry out the provisions hereof, and repealing so much of Section

5095, of the Codes and Statutes of Oregon, compiled and annotated by Hon. Charles B. Bellinger and William W. Cotton, as is inconsistent with the provisions of this Act, and declaring an emergency," and that thereafter the legislative assembly of the State of Oregon, at the twenty fifth regular session thereof, attempted to amend Section 33 of said act, and to that end passed Chapter 103, as set out at page 163, Session Laws of Oregon for the year 1909, which said last named act is entitled, "An Act to amend Section 33 of Chapter 53 of the General Session Laws of the State of Oregon for the year 1907" and was filed in the office of the Secretary of State on February 23, 1909, to which said acts reference is here made as if the same were specifically set out; and your orators pray that the said acts may be taken as part of this bill as fully as though embodied herein, which said acts and amendments will be referred to, for convenience, as the Railroad Commission Act.

VI.

That pursuant to the terms of said Railroad Commission Act, the said defendants Thomas K. Campbell, Clyde B. Aitchison, and Oswald West were attempted to be appointed as members of the Railroad Commission of Oregon, referred to in said act, and the said defendants Campbell, Aitchison and West are now and have at all times hereinafter mentioned been attempting to act as the Railroad Commission of Oregon attempted to be created by the said Railroad Commission Act.

VII.

That by the terms of Section 57 of the Oregon Commission Act hereinbefore referred to, it is provided as follows:

"SECTION 57. The Commission shall inquire into any neglect or violation of the laws of this State by any railroad corporation doing business therein, or by the officers, agent, or employes thereof, or by any person operating a railroad, and shall have the power, and it shall be its duty, to enforce the provisions of this Act as well as all other laws relating to railroads and report all violations thereof to the Attorney General; upon the request of the Commission it shall be the duty of the Attorney General or the prosecuting attorney of the proper county to aid in any investigation, hearing or trial had under the provisions of this Act, and to institute and prosecute all necessary actions or proceedings for the enforcement of this Act or the recovery of penalties payable to the State, and of all other laws of this State relating to railroads, and for the punishment of all violations thereof. Any forfeiture or penalty herein provided shall be recovered by an action brought thereon in the name of the State of Oregon in any Court of appropriate jurisdiction. The Commission shall have authority to employ special counsel in any proceeding, investigation, hearing or trial, and to fix their compensation."

That on the 21st day of September, 1910, the said Railroad Commission of Oregon, pursuant to an investigation upon its own initiative, and pretending to observe and follow the said Railroad Commission Act, made an order in words and figures as follows, to-wit:

Before the Railroad Commission of Oregon.

No. F-125.

In the Matter of SOUTHERN PACIFIC COMPANY.

(Investigation on Commission's Own Motion.)

Order.

Now on this 21st day of September, 1910, the above entitled matter comes on before the Commission for final determination, due notice of hearing having been given said Southern Pacific Company and said Company having been furnished with a statement setting

forth the rates investigated, and hearing having been duly had. And the Commission having considered the testimony and proofs taken and the argument of counsel, and being fully advised in the premises, finds—

1. That the said Southern Pacific Company is a corporation organized under and existing by virtue of the laws of the State of Kentucky, and is a common carrier engaged in the transportation of persons and property by railroad between the following points in the State of Oregon, to-wit:

9 From Portland, Oregon to the California state line; from Portland, Oregon to St. Joseph, Oregon; from Portland, Oregon to Corvallis, Oregon; from Sheridan Junction, Oregon to Sheridan, Oregon; from Whiteson, Oregon to Airlie, Oregon; from Woodburn, Oregon to Mohawk Junction, Oregon; from Mohawk Junction, Oregon to Wendling, Oregon; from Mohawk Junction, Oregon to Natron, Oregon; from Springfield Junction, Oregon to Springfield, Oregon; from Albany Junction, Oregon, to Lebanon, Oregon; That as such common carrier said Southern Pacific Company is subject to the provisions of Chapter 53 of the Laws of Oregon for the year 1907 and acts amendatory thereof and supplemental thereto.

2. That the said Southern Pacific Company maintains freight stations in the City of Portland known as Portland (Park Street), East Portland and Portland (Jefferson Street).

3. That the said Southern Pacific Company imposes and charges for the intrastate transportation of freight in carloads and less than carloads, between Portland (Part St.), East Portland and Portland (Jefferson St.) Oregon, and other points upon its said lines of railroad within the state of Oregon the several class rates hereinafter set forth which govern the intrastate transportation of freight between such stations in Portland and said other stations hereinafter named taking class rates according to Section 1 of said Southern Pacific Company's Local and Joint Freight Tariff No. 235-A, issued September 1, 1909, and effective October 9, 1909, O. R. C. No. 434, with its effective supplements. The classification of freight taking class rates is determined by the classification filed by said Southern Pacific Company with said Railroad Commission of Oregon known as The Western Classification No. 48, together with its supplements and reissues, and also by the exceptions to said Classification No. 48, being a reissue of the Western Classification No. 47 and its supplements described in the original statement herein. Said class rates are as follows:

Index No.	Miles from Portland (approximate.)	Rate in cents per 100 pounds.										
		Class										E
		1	2	3	4	5	A	B	C	D		
	5	14	12	8	8	8	8	7	6	4	4	4
	6											
	7	15	13	11	9	8	8	8	6	4	4	4
	8											
	9											
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	40											
	41											
	42											
	43											
	44											

Between—1. Portland (Park St.), Oregon, or
2. East Portland, Ore., and—

Willsburg
 Milwaukee
 Haskell
 Laidlaw
 Clackamas
 Paper Mill
 Oregon City
 Canemah
 Pulp
 Reform School
 Turner
 Marion
 Jefferson
 Millersburg
 Albany
 Froman
 Fry
 Goltra
 Cranor
 Tallman
 Irvinville
 Calahan
 Lebanon
 Tangent
 Shedd
 Halsey

Rates in cents per 100 pounds.

		Class										
		Between—1. Portland (Park St.), Oregon, or 2. East Portland, Ore., and—										
Index No.	from Portland (approximate).	1	2	3	4	5	A	B	C	D	E.	
45	103		34	31	28	27	27	22	18	13	11	
46	106	40	37	33	30	28	28	22	18	13	11	
47	106	40	37	33	30	28	28	23	19	14	11	
48	110		37	33	30	28	28	23	19	14	11	
49	116	45	41	38	34	32	30	24	19	14	12	
50	118	45	41	38	34	32	30	24	19	14	12	
51	123		42	39	36	33	31	25	20	15	12	
52	126	48	44	41	37	34	32	26	20	15	12	
53	130		44	41	37	34	32	26	20	15	12	
54	135		45	42	38	35	33	27	21	15	12	
55	140		47	43	40	36	34	27	21	16	13	
56	142		48	44	41	37	35	28	21	16	13	
57	144		48	44	41	37	35	28	21	16	13	
58	146		49	45	42	38	35	28	21	16	13	
59	147		50	46	42	39	36	29	22	16	13	
60	149		50	46	42	39	36	29	22	16	13	
61	153		51	47	43	40	37	29	22	16	13	
62	155		52	48	44	41	38	30	22	17	14	
63	156		52	49	45	41	38	30	22	17	14	
64	158		52	49	45	41	38	30	22	17	14	
65	159		52	49	45	41	38	30	22	17	14	
66	160		52	49	45	41	38	30	22	17	14	
67	162		53	49	46	42	38	31	22	17	14	
68	163		53	49	46	42	39	31	23	17	14	
69	164		53	49	46	42	39	31	23	17	14	
70	167		55	51	47	43	39	31	23	17	14	

71	173	Rice Hill	56	52	48	44	40	32	23	17	14
11											
72	173	Isadora	56	52	49	45	41	33	23	18	15
73	181	Oakland	59	55	50	46	42	34	23	18	15
74	183	Whitmore	60	56	51	47	43	35	24	18	15
75	185	Sutherland	61	56	52	48	44	35	24	18	15
76	187	Deady	61	56	52	48	44	35	24	18	15
77	189	Wilbur	61	56	52	48	44	35	24	18	15
78	193	Winchester	62	57	53	48	44	35	24	18	15
79	198	Roseburg	64	59	55	50	45	36	25	15	15
80	203	Green	65	60	56	51	46	37	25	16	16
81	209	Dillard	67	61	57	52	48	38	25	16	16
82	213	Round Prairie	68	63	58	53	48	38	26		
83	216	Dole	69	64	59	54	49	39	26		
84	220	Myrtle Creek	70	65	60	55	50	39	26		
85	222	Weaver	71	66	61	56	51	40	27		
86	226	Riddle	72	67	62	56	51	40	27		
87	230	Cornutt	73	67	63	58	53	42	27		
88	235	Salt Creek	76	70	65	59	53	42	27		
89	235	Doe Creek	76	70	65	59	53	42	27		
90	237	Smith Creek	78	70	65	59	53	42	27		
91	239	Nichols	76	70	65	59	53	42	27		
92	241	Table Creek	78	72	68	61	55	44	28		
93	243	Union Creek	78	72	68	61	55	44	28		
94	246	Skidaddle Creek	79	72	68	61	56	44	28		
95	249	West Fork	79	72	68	61	56	44	28		
96	252	Tunnel No. 3	81	74	69	62	57	45			
97	254	Tunnel No. 4	81	74	69	62	57	45			
98	255	Tunnel No. 5	82	75	70	63	58	46	29		

Index No.	Miles from Portland (approximate).	Between—1. Portland (Park St.), Oregon, or 2. East Portland, Ore., and—	Rates in cents per 100 pounds.									
			Class									
			1	2	3	4	5	A	B	C	D	E
99	256	Tunnel No. 6		82	76	70	63	58	46	29		
100	257	Tunnel No. 7		82	76	70	63	58	46	29		
101	259	Reuben		82	76	70	63	58	46	29		
102	261	Lystul		83	77	71	64	58	46			
103	263	Glendale		83	77	71	64	58	46			
104	269	Wolf Creek		85	78	72	65	59	47			
105	276	Leland		88	81	75	67	61	48			
106	280	Tunnel No. 9		88	82	77	68	62	49			
107	283	Hugo		89	82	77	68	62	49			
108	285	Three Pines		90	84	77	70	63	50			
109	288	Merlin		90	84	77	70	63	50			
110	297	Sugar Pine Door & Lbr. Co.		93	86	80	72	65	51			
111	297	Grants Pass		93	86	80	72	65	51			
112	306	Woodvale		96	89	82	74	67	52			
113	313	Gold Hill		98	90	84	76	68	54			
114	319	Gold Ray		100	92	86	77	70	55			
115	320	Tolo		100	92	86	77	70	55			
116	325	Central Point		102	93	87	78	70	55			
117	329	Medford		103	95	88	79	71	56			
118	331	Voorhies		104	96	89	80	72	57			
119	333	Phoenix		104	96	89	80	72	57			
120	336	Talent		105	98	90	81	73	57			
121	342	Ashland		107	99	91	82	74	58			
122	346	Clawson		108	101	93	83	75	58			
123	347	Ayers		109	102	93	83	75	59			
124	351	Steinman		110	103	94	84	76	60			

Index No.	Miles from Portland (approximate).	Between—1. Portland (Park St.), Oregon, or 2. East Portland, Ore., and—	Rate in cents per 100 pounds.									
			Class									
			1	2	3	4	5	A	B	C	D	E
154	100	Twin Buttes		37	33	30	28	27	21	18	13	11
155	104	Rowland		37	33	30	28	28	22	18	14	11
156	108	Priceboro	43	39	35	32	30	28	23	18	14	11
157	112	Wilkins	45	40	37	34	31	29	23	19	14	12
158	116	Coburg	46	41	37	35	31	30	24	19	14	12
159	119	Armitage	46	41	38	35	32	30	24	19	14	12
160	123	Springfield		42	39	36	33	31	25	20	15	12
161	127	Hendricks		44	41	37	34	32	26	20	15	12
162	129	Yarnell		44	41	37	34	32	26	20	15	12
163	131	Spores		45	42	38	35	33	27	21	15	12
164	133	Donna		45	42	38	35	33	27	21	15	12
165	136	Marcola		45	42	38	35	33	27	21	15	12
166	137	Hyland		47	43	40	36	34	27	21	16	13
167	138	Barney		47	43	40	36	34	27	21	16	13
168	140	Wendling		47	43	40	36	34	27	21	16	13
169	125	Douglas		43	40	37	34	32	26	20	15	12
170	129	Natron		43	40	37	34	32	26	20	15	12
13		Seitters	26	21	17	14	13	12	12	11	8	7
195	43	Whitson	26	21	17	14	13	12	12	11	8	7
196	46	Amity	28	23	19	16	15	14	14	12	8	7
197	49	McCoy	28	25	22	19	18	17	16	12	9	8
198	54	Crowley	28	25	22	20	18	17	16	13	9	8
199	59	Derry	28	25	22	20	18	17	17	13	9	8
200	62	Independence	28	25	22	20	18	17	17	13	11	10
201	68				22	20	18	17	17	13	11	10

202	Parker	73	22	20	18	17	17	13	11	10
203	Suwer	75	22	20	18	17	17	13	11	10
204	Wellsdale	78	22	20	18	17	17	13	11	10
205	Calloway	81	22	20	18	17	17	13	11	10
206	Lewisburg	83	22	20	18	17	17	13	11	10
207	Corvallis	89	22	20	18	17	17	13	11	10
216	Galbreath	14	22	20	18	17	17	13	11	10
217	Tualatin	15	12	10	9	9	8	7		
218	Herman	16	12	10	9	9	8	7		
219	Gore	17	22	19	15	12	11	10	8	5
220	Cipole	17	22	19	15	12	11	10	8	5
221	Ford	18	22	19	15	12	11	10	8	5
222	Sherwood	19	22	19	15	12	11	10	8	5
223	Middleton	21	23	19	15	12	11	10	8	5
224	Votaw	22	23	19	15	12	11	10	9	5
225	Frank	22	23	19	15	12	11	10	9	
226	Rex	24	23	19	15	12	11	10	9	
227	Springbrook	26	24	19	15	12	11	10	9	6
228	Newberg	28	24	19	15	12	11	10	9	6
229	Dundee Junction	31	24	19	11			9	9	
230	Dayton	34	24	19	11			9	9	
231	Oak Lawn	35	24	19	11			9	9	
232	La Fayette	37	24	19	11			9	9	
233	St. Joseph	39	24	19	11			9	9	
234	McMinnville	48						7	7	
237	Holmes		32	28	18	15	12	7	7	7
238	Briedwell		33	28	18	15	12	8	8	
239	Harrison		32	29	19	16	12			
240	Broadmead		33	29	21	19	16			
242	Ballston		33	39	25	20	16			8

Rate in cents per 100 pounds.

Index No.	Miles from Portland (approximate).	Between Portland (Jefferson St.) and—	Class									
			1	2	3	4	5	A	B	C	D	E
243		Sheridan	33	30	26	22	21	20	17	13	9	8
244		Perrydale	33	29	25	21	20	19	16	12	9	8
245		Smithfield	33	30	26	22	21	20	17	13	9	8
247		Dallas	34	30	26	23	22	22	18	14	11	9
248		Cochrane			27	23	23	22	18	14	11	9
249		Monmouth					24	23	19	15	11	10
250		Luckiamute	35	31		24	24	23	20	15	11	10
251		Strong	35	32		24	24	24	20	15	11	10
252		Simpson	35	32		24	24	24	20	15	11	10
253		Airlie	35	32		25	24	24	20	16	11	10
14												
216		Galbreath			11	9	8	8	7	6		4
217		Tualatin		14	12	10	9	9	8	7	4	4
218		Herrman	17	15	12	10	9	9	8	7		4
219		Gore	17	15	12	10	9	9	8	7		4
220		Cipole	17	15	12	10	9	9	8	7		4
221		Ford	18	16	13	11	9	9	8	7		4
222		Sherwood	19	16	14	11	9	9	9	7		4
223		Middleton	20	17	14	11	9	9	9	7		4
224		Votaw	20	17	14	11	9	9	9	7		5
225		Frank	20	17	14	11	9	9	9	7		5
226		Rex	20	17	14	11	9	9	9	7		5
227		Springbrook	21	17	14	11	9	9	9	7		5
228		Newberg	21	17	14	11	9	9	9	7		5
229		Dundee Junction	21	17	14	11	9	9	9	7	8	

- 15 4. That the above enumerated class rates are and each of them is unjust, unreasonable and excessive.

Said Southern Pacific Company also makes and charges in a similar manner numerous other class rates which are fully set out in the said tariff No. 235-A, O. R. C. No. 434, with its effective supplements.

5. That the aforesaid class rates are not arranged upon any uniform or approximately uniform relationship as to each other, and that in consequence thereof the aforesaid rates are unjustly discriminatory as against the several stations and localities above enumerated, and are unjustly discriminatory as between the various classes of commodities taking class rates according to the said Western Classification No. 48.

6. That just and reasonable and non-discriminatory charges for said Southern Pacific Company to charge, collect and impose in the future in lieu of those hereinafter found to be unjust and unreasonable, are the following:

Index No.	Miles from Portland (approximate).	Between—1. Portland (Park St.), Oregon, or 2. East Portland, Ore., and—	Rates in cents per 100 pounds.									
			Class									
			1	2	3	4	5	A	B	C	D	E
16												
5	5	Willsburg	10	9	7	6	5	5	4	3	3	2
6	7	Milwaukee										3
7	10	Haskell	14	12	10	8	7	7	6	4	4	3
8	11	Laidlaw										
9	11	Clackamas							7	5	5	
10	14	Paper Mill							7	5	5	
11	15	Oregon City							7	5	5	
12	16	Canemah							7	5	5	
13	18	Pulp										4
28	58	Reform School	25	22	18	17	15	15	12	10	7	4
29	60	Turner	25	22	19	17	15	15	13	10	7	6
30	67	Marion	26	23	20	18	15	15	13	10	8	7
31	71	Jefferson	27	23	20	18	15	15	13	10	8	7
32	75	Millersburg	27	24	20	18	16	16	14	11	8	7
33	80	Albany			21	19	16	16	14	11	8	7
34	83	Froman		26	22	19	16	16	14	11	8	7
35	85	Fry		26	22	19	16	16	14	11	8	7
36	87	Goltra		26	22	19	16	16	14	11	8	7
37	88	Cranor		26	22	19	16	16	14	11	8	7
38	89	Tallman		26	22	19	16	16	14	11	8	7
39	88	Irvineville	31	27	22	19	16	16	14	11	8	7
40	86	Calahan		27	22	19	16	16	14	11	8	7
41	85	Lebanon		27	22	19	16	16	14	11	8	7
42	86	Tangent		27	22	19	16	16	14	11	8	7
43	92	Shedd			22	20	17	17	15	11	9	7
					24	21	18	18	15	12	9	8

69	Boswell Springs	52	43	37	31	31	24	18	15	12
70	Yoncalla	54	44	38	32	32	25	19	16	13
71	Rice Hill	54	44	38	32	32	25	19	16	13
72	Isadora	56	46	40	33	33	26	20	17	13
73	Oakland	66	56	46	40	33	26	20	17	13
74	Whitmore	67	57	47	40	34	27	20	17	13
75	Sutherland	68	58	48	41	34	27	20	17	14
76	Deady	68	58	48	41	34	27	20	17	14
17										
77	Wilbur	59	48	41	35	35	28	21	17	14
78	Winchester	60	49	42	35	35	28	21	14	14
79	Roseburg	61	50	43	36	36	29	22	14	14
80	Green	63	52	44	37	37	30	22	15	15
81	Dillard	65	53	46	38	38	30	23	15	15
82	Round Prairie	66	55	47	39	39	31	23		
83	Dole	67	55	47	40	40	32	24		
84	Myrtle Creek	68	56	48	40	40	32	24		
85	Weaver	70	57	49	41	41	33	25		
86	Riddle	71	58	50	42	42	33	25		
87	Cornutt	71	58	50	42	42	33	25		
88	Salt Creek	73	60	52	43	43	34	26		
89	Doe Creek	73	60	52	43	43	34	26		
90	Smith Creek	73	60	52	43	43	34	26		
91	Nichols	73	60	52	43	43	34	26		
92	Table Creek	76	62	53	45	45	36	27		
93	Union Creek	76	62	53	45	45	36	27		
94	Skiddadle Creek	77	63	54	45	45	36	27		
95	West Fork	77	63	54	45	45	36	27		
96	Tunnel No. 3	78	64	55	46	46	37			
97	Tunnel No. 4	78	64	55	46	46	37			

Index No.	Miles from Portland (approximate).	Between—1. Portland (Park St.), Oregon, or 2. East Portland, Ore., and—	Rates in cents per 100 pounds.									
			Class									
			1	2	3	4	5	A	B	C	D	E
98	255	Tunnel No. 5.....	79	65	65	56	47	47	37	28		
99	256	Tunnel No. 6.....	80	66	66	56	47	47	37	28		
100	257	Tunnel No. 7.....	80	66	66	56	47	47	37	28		
101	259	Reuben	80	66	66	56	47	47	37	28		
102	261	Lystul	81	67	67	57	48	48	38			
103	263	Glendale	81	67	67	57	48	48	38			
104	269	Wolf Creek	82	68	68	58	49	49	39			
105	276	Leland	85	70	70	60	50	50	40			
106	280	Tunnel No. 9.....	86	71	71	61	51	51	41			
107	283	Hugo	87	71	71	61	51	51	41			
108	285	Three Pines	88	73	73	62	52	52	42			
109	288	Merlin	88	73	73	62	52	52	42			
110	297	Sugar Pine Door & Lbr. Co.	91	75	75	64	54	54	43			
111	297	Grants Pass	91	75	75	64	54	54	43			
112	306	Woodville	94	78	78	67	56	56	44			
113	313	Gold Hill	96	79	79	68	57	57	45			
114	319	Gold Ray	98	81	81	69	58	58	46			
115	320	Tolo	98	81	81	69	58	58	46			
116	325	Central Point	99	81	81	70	58	58	46			
117	329	Medford	100	83	83	71	59	59	47			
118	331	Voorhies	102	84	84	72	60	60	48			
119	333	Phoenix	102	84	84	72	60	60	48			
120	336	Talent	104	85	85	73	61	61	49			
121	342	Ashland	105	86	86	74	62	62	49			
122	346	Clawson	106	88	88	75	63	63	50			
123	347	Ayres	107	88	88	76	63	63	50			

[illegible]

Index No.	Miles from Portland (approximate).	Between—1. Portland (Park St.), Ore. 2. East Portland, Ore. 208. Portland (Jefferson St.), Oregon.	Rates in cents per 100 pounds.									
			Class									
			1	2	3	4	5	A	B	C	D	E
156	108	Priceboro	42	36	30	26	22	22	17	13	11	9
157	112	Wilkins	43	37	31	26	22	22	17	13	11	9
158	116	Coburg	44	38	31	27	23	23	18	13	11	9
159	119	Armitage	45	38	32	27	23	23	18	14	12	9
160	123	Springfield		39	33	28	23	23	18	14	12	9
161	127	Hendricks		41	34	29	24	24	19	14	12	10
162	129	Yarnell		41	34	29	24	24	19	14	12	10
163	131	Spores		43	35	30	25	25	20	15	13	10
164	133	Donna		43	35	30	25	25	20	15	13	10
165	136	Marcola		43	35	30	25	25	20	15	13	10
166	137	Hyland		44	36	31	26	26	21	16	13	10
167	138	Barney		44	36	31	26	26	21	16	13	10
168	140	Wendling		44	36	31	26	26	21	16	13	10
169	125	Douglas		40	33	28	24	24	19	14	12	9
170	129	Natron		41	34	29	24	24	19	14	12	10
19												
195	43	Seiters	24	19	15	12	11	10	10	9	7	6
196	46	Whiteson	25	20	16	13	12	11	11	9	7	6
197	49	Amith	25	21	17	14	12	12	11	10	7	6
198	54	McCoy	26	22	18	15	13	13	12	10	8	7
199	59	Crowley	27	23	19	17	14	14	13	10	8	7
200	62	Derry	27	24	19	17	15	15	13	11	8	7
201	63	Independence										
202	73	Parker			21	19	16	16	14	11	8	7
203	75	Stover			21	19	16	16	14	11	8	7

204	78	Welldale	21	19	16	16	14	11	8	7
205	81	Calloway	21	19	16	16	14	11	8	7
206	83	Lewisburg	21	19	16	16	14	11	8	7
207	89	Corvallis	21	19	16	16	14	11	8	7
216	14	Galbraith	11	9	8	8	7	6		
217	15	Tualatin	11	9	8	8	7	6		
218	16	Herman	16	14	12	10	9	8	7	4
219	17	Gore	17	15	12	10	9	8	7	4
220	17	Cipole	17	15	12	10	9	8	7	4
221	18	Ford	17	15	12	10	9	8	7	4
222	19	Sherwood	18	16	13	11	9	8	7	4
223	21	Middleton	19	16	14	11	9	8	7	4
224	22	Votaw	20	17	14	11	9	8	7	4
225	22	Frank	20	17	14	11	9	8	7	4
226	24	Rex	20	17	14	11	9	8	7	4
227	26	Springbrook	21	17	14	11	9	8	7	5
228	28	Newberg	21	17	14	11	9	8	7	5
229	31	Dundee Junction	21	17	14	11	9	8	7	5
230	34	Dayton	21	18	10	10	10	8	6	6
231	35	Oak Lawn	21	18	10	10	10	8	6	6
232	37	Lafayette	21	18	10	10	10	8	6	6
233	39	St. Joseph							7	7
234	42	McMinnville							7	7
237	45	Holmes	25	21	17	14	12	11	10	
238	48	Briedwell	26	22	18	15	13	12	10	
239	48	Harrison	26	22	18	15	13	12	10	
240	51	Broadmead	26	22	18	15	13	12	10	
241	51	Sheridan	26	22	18	15	13	12	10	
242	54	Ballston	27	23	19	17	14	13	10	7
243	58	Sheridan	27	23	19	17	14	13	10	7

Index No.	Miles from Portland (approximate).	Between—1. Portland (Park St.), Oregon, or 2. East Portland, Ore., and—	Rate in cents per 100 pounds.										
			Class										
			1	2	3	4	5	A	B	C	D	E	
244	53	Perrydale	26	22	18	15	13	13	12	10	8	7	
245	58	Smithfield	27	23	19	17	14	14	13	10	8	7	
246	63	Thurston	27	24	19	17	15	15	13	11	8	7	
247	64	Dallas	27	24	19	17	15	15	13	11	8	7	
248	68	Cochran			21	19	16	16	14	11	8	7	
249	71	Monmouth					16	16	14	11	8	7	
250	75	Luckiamute	29	26		20	17	17	14	11	9	8	
251	75	Strong	30	27		21	18	18	14	11	9	8	
252	77	Simpson	31	27		21	18	18	14	11	9	8	
253	80	Airlie	32	27		21	18	18	14	11	9	8	

20 It is therefore ordered, considered and determined, that the said Southern Pacific Company shall cease and desist from charging, imposing and collecting for the intrastate transportation of freight taking class rates under the provisions of The Western Classification and under the exceptions to said Classification aforesaid, the several rates set out in Paragraph 3 hereof, which rates are now charged, collected and imposed by said Southern Pacific Company, and in lieu thereof shall in future charge, collect and impose the several rates respectively set forth in Paragraph 6 hereof, and shall make the necessary changes in its tariffs and file the same with the Commission on or before twenty days from the date of service of a copy of this order upon it.

Nothing in this order contained shall be construed to apply to interstate commerce being carried on by said Southern Pacific Company over any of the lines of railroad aforesaid.

Dated at the Capitol at Salem, Oregon, this 21st day of September, 1910.

RAILROAD COMMISSION OF OREGON,
By THOS. K. CAMPBELL,
CLYDE B. AITCHISON,
OSWALD WEST, *Commissioners.*

Attest:

GEO. O. GOODALL, *Secretary.*

Which was duly served upon said Southern Pacific Company on September 23rd, 1910.

21

VIII.

That the matter and amount in dispute in this suit, exclusive of interest and costs, exceeds the sum of \$2,000, and your orators show that this is a suit arising under the Constitution of the United States and the laws passed pursuant thereto, for that your orators seek, among other things, to enjoin the said defendants Campbell, Aitchison and West, acting as the Railroad Commission of Oregon, and the said Crawford, Attorney General of Oregon, and each of them, from attempting in any manner to enforce the provisions of a certain pretended order of said September 21, 1910, hereinbefore set out, relating to rates and charges for transportation of freight on the railroad lines of your orators, and from instituting any action, suit or proceeding against your orators or either thereof, or their officers, directors, agents, servants or employes on account of any violation of any of the terms or provisions of the said pretended order, or from attempting to enforce in any manner the provisions of the said Railroad Commission Act against your orators, or either of them, or any of their officers, agents or employes on account of any violation thereof, for the reason that the said Act and the said order, and each of them, and all the tariffs, rates, charges, and regulations assumed to be prescribed by said order are in violation of the constitution of the United States and of the State of Oregon, and are likewise in violation of an act of Congress approved February 4,

1887, Chapter 124, 22 Statutes at Large, 379, entitled, "An Act to regulate commerce" and of the various acts amendatory thereof and supplemental thereto, and particularly said act as amended June 18, 1910; and likewise in violation of the Constitution of the State of Oregon, and of said act as more particularly hereinafter set out.

The revenue of your orators derived from the transportation of freight which is interstate in character is large, and the portion thereof affected by the said pretended order of the Railroad Commission of Oregon, if such order be enforced and the rates therein mentioned be put into effect, will largely exceed the sum of two thousand dollars, exclusive of interest and costs.

IX.

That the Union Pacific Railroad Company owns and operates a line of railroad extending from Union Pacific Transfer, in Council Bluffs, Iowa, to Granger in the State of Wyoming, and the Oregon Short Line Railroad Company owns and operates a line of railroad extending from Granger in the State of Wyoming to Huntington in the State of Oregon, and, extending from Union Pacific Transfer east to Chicago, and having physical connection with the line of the Union Pacific Railroad Company are various lines of railroad owned and operated by the Chicago & Northwestern Railroad Company, the Chicago, Rock Island & Pacific Railway Company and the Chicago, Milwaukee & St. Paul Railway Company. At Granger, Wyoming, there is a physical connection between the line of the Union Pacific Railroad Company and that of the Oregon Short Line Railroad Company, and at Huntington, Oregon, there is a physical connection between the line of the Oregon Short Line Railroad Company and that of the Oregon Railroad & Navigation Company, which latter company handles interstate commerce into Portland and East Portland. That because of such physical connections and of the through tariffs published and established by the various companies parties thereto, merchandise and commodities of all kinds have moved from Chicago, Milwaukee, Duluth, St. Paul, Minneapolis, St. Louis and points and places located upon and east of the Missouri River, to Portland, in the State of Oregon. That the Northern Pacific Railway Company is a common carrier engaged in interstate commerce between Duluth and St. Paul, and Portland, Seattle and Tacoma, with physical rail connection into the City of Portland. That the Spokane, Portland & Seattle Railway Company, together with its connections with the Great Northern Railway Company at Spokane, Washington, has a physical all-rail connection into Portland, and is engaged, with its connecting lines, in moving, under its published through tariffs, merchandise and commodities of all kinds, from Chicago, Milwaukee, Duluth, St. Paul, Minneapolis, St. Louis, and other Eastern shipping points in other states of the United States, to Portland, Oregon.

That Southern Pacific Company, your orator, with its connecting carriers, is engaged in interstate commerce, as a common carrier for hire, from New Orleans, La., Ogden, Utah, El Paso, Texas, Los Angeles, San Francisco, and other points in the State of California.

with all-rail connection into the City of Portland, State of Oregon, at East Portland, and is engaged from time to time in moving, according to rates of through tariffs published and established by said company and its connecting lines, interstate commerce consisting of merchandise and commodities of all kinds, from these interstate points in other states than the State of Oregon, to Portland and East Portland, in said State of Oregon, and that all of said railroad companies having through published tariffs, so engaged in interstate commerce, are engaged in the movement of said interstate commerce not only to Portland and East Portland from all said points in said other states, but to all points on the lines of Southern Pacific Company in Oregon, applying to such shipment the local rates in effect and attempted to be modified by said pretended order hereinbefore set out. That all said interstate traffic handled by Southern Pacific Company, or subject to movement over its lines in Oregon, is materially affected by ocean competition on all traffic moving out of Los Angeles and San Francisco, California, and other Bay points, in State of California as well as interior points in the State of California, carrying a local rate sufficient to induce movement to ocean points, which said competition extends to transportation of interstate commerce from said points to Portland and East Portland, Oregon, and all points on the lines of Southern Pacific Company in Oregon, and that the reduction of said class rates so attempted to be effected by the said order directly and immediately affects the movement of all said interstate traffic.

That the tariffs filed with the Interstate Commerce Commission, as required by the said Act of Congress approved Feb. 4, 1887, entitled, "An Act to regulate commerce," and the various amendments thereto and supplements thereof, and particularly said act of June 18, 1910, that prescribe the rates under which said interstate commerce is moved to Portland and East Portland and all points upon lines in Oregon of your orator Southern Pacific Company, are as follows:

Transcontinental Freight Bureau, West Bound, Tariff 4-H, I. C. C. 928, effective October 10, 1910.

Transcontinental Freight Bureau, East Bound, Tariff 2-H, I. C. C. 930, effective October 10, 1910.

Transcontinental Freight Bureau, Competitive Local and Joint Freight Tariff, West Bound, 5-F, I. C. C. 918, effective April 1, 1910.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 161, I. C. C. No. 3021, effective July 1, 1908.

Southern Pacific Company (Pacific System, and Oregon Lines), Local, Joint and Proportional Freight Tariff, No. 162-B, I. C. C. No. 3367, effective September 11, 1910.

Southern Pacific Company (Pacific System, and Oregon Lines) Local and Joint Freight Tariff No. 418, I. C. C. No. 3090, effective January 1, 1909.

Southern Pacific Company (Pacific System, and Oregon Lines),

Local and Joint Freight Tariff No. 203-A, I. C. C. No. 3209, effective July 6, 1909.

25 Southern Pacific Company (Pacific System, and Oregon Lines), Local Joint Freight Tariff No. 576-A, I. C. C. No. 3313, effective January 23, 1910.

Southern Pacific Company (Pacific System, and Oregon Lines) Local and Joint Freight Tariff No. 577, I. C. C. No. 3350, effective September 24, 1909.

Southern Pacific Company (Pacific System, and Oregon Lines), Local and Joint Freight Tariff No. 578-A, I. C. C. No. 3297, effective December 17, 1909.

Southern Pacific Company (Pacific System, and Oregon Lines), Local and Joint Freight Tariff No. 579, I. C. C. No. 3252, effective Sept. 24, 1909.

Southern Pacific Company (Pacific System, and Oregon Lines), Local and Joint Freight Tariff No. 580, I. C. C. No. 3253, effective Sept. 24, 1909.

Southern Pacific Company (Pacific System, and Oregon Lines), Local, Joint and Proportional Freight Tariff No. 464, I. C. C. No. 3339, effective June 12, 1910.

That Southern Pacific Company, Lines in Oregon, Local and Joint Freight Tariff No. 235-A, naming class and commodity rates for transportation of freight between Portland, East Portland, Portland (Jefferson Street), Oregon, and points on Lines of Southern Pacific Company in Oregon, governed, except as otherwise provided in Tariff and as amended, by the Western Classification No. 47 (F. O. Becker's, Agent, I. C. C. No. 5) supplements thereto and reissues thereof, which said rates are attempted to be reduced by the Commission's order F-125, is duly filed with the Interstate Commerce Commission, bearing I. C. C. No. 3265, thereby prescribing the use of these said rates on all interstate traffic moving through Portland and destined to points on the Southern Pacific Company, Lines in Oregon, which said tariffs are duly filed with the Interstate Commerce Commission as required by law, together with tariffs on all interstate commerce moved by all transcontinental railroads aforesaid, moving into Portland and East Portland, Oregon, and

26 carrying interstate traffic destined to points at Portland and East Portland, and on the lines of Southern Pacific Company in Oregon; all of which said tariffs so filed as aforesaid are required to be observed by law. And your orators pray that your Honors will take judicial notice of all said tariffs so filed with the Interstate Commerce Commission, as aforesaid, to which reference is here made as if the same were fully written herein or made a part of this bill of complaint by exhibit or otherwise, and which your orators cannot more fully set out in this bill of complaint without encumbering the record.

And your orators specifically allege and show that the tariffs listed, Southern Pacific Company (Pacific System, and Oregon Lines), Local and Joint Freight Tariffs, hereinbefore set out, show through class and commodity rates from a large number of shipping points in the State of California on the line of Southern Pacific Company,

to all points in Oregon on the lines of Southern Pacific Company in Oregon, which said rates are made up by using the ocean competitive rate from San Francisco and other Bay points, to Portland, adding thereto the local class rates from out of Portland and East Portland to points on the lines of Southern Pacific Company in Oregon, and that any reduction of existing class rates, attempted as in said order of said Railroad Commission, hereinbefore set out, directly, immediately and materially affects, changes and alters the said rates on said interstate shipments, thereby reducing said interstate rates to the extent of the said attempted reduction of the said class rates so attempted to be ordered into effect by said order F-125. That the said order F-125, so attempted to be made as aforesaid, if put into effect, will materially and directly affect all interstate freight traffic of your orators or all other common carriers moving

27 traffic to Portland and East Portland, and to points on the line of Southern Pacific Company in Oregon, and thereabout your orators further allege and show that to comply with the said order aforesaid, so attempted to be made by the said Railroad Commission, reducing class rates from Portland to points on the line of Southern Pacific Company in Oregon, would materially affect and reduce interstate rates.

And your orators would illustrate and specifically set forth and show that class rates from Portland south, covered by said order, are used as basing rates on traffic originating beyond Portland, and form a portion of the through rate on said traffic having origin beyond the boundaries of the State of Oregon, and destined to points on Southern Pacific Company, Lines in Oregon, and that there is but one exception in the application of class rates from Northern California points, north of Marysville, to Southern Oregon points, and with this exception, all traffic subject to application of class rates, originating in California south of Marysville, and in every other state of the United States, destined to points on the Southern Pacific Company, Lines in Oregon, is transported at through rates obtained by adding to the rate applying to Portland, the class rate from Portland to destination.

Some of the tariffs filed with the Interstate Commerce Commission, applicable to said interstate business of your orators, provide rates on traffic destined to points on the Southern Pacific Company, Lines in Oregon, specifically authorize the addition of class rates from Portland to destination, over established routes which do not require that the traffic be transported through Portland, namely:

Transcontinental Freight Bureau, West-Bound, Tariff No. 4-H I. C. C. No. 928, naming local and joint class rates, governed (See exception 2, page 29) by Western Classification No. 48 (I. C. C. No. 6 of F. O. Becker, Agent), supplements thereto or reissues thereof, and Local, Joint and Proportional Commodity Rates from Eastern shipping points designated on pages 2 to 15 inclusive, to "North Pacific Coast Terminals" designated on page 16, and points in Oregon and Washington, designated on pages 17 to 22, and 24 to 28 inclusive, effective October 10, 1910, which tariff, on page 26, provides bases for through rates to points named along the

Southern Pacific Company, Lines in Oregon, and shows the present class rates now in effect as arbitraries to be added to the class or commodity rates applying to Portland, and also designates the gateways or routes over which the traffic shall move, to-wit:

"Will apply only via Gateways 32-A, 36, 41-A, 41-B, 41-C, 44 or 66, as shown on pages 30 to 34, inclusive," and the Gateways referred to are as follows:

32-A, Northern Pacific Ry. to Wallula, Wash., Oregon Railroad & Navigation Co. to Portland, Ore., Southern Pacific Co. (Lines in Oregon) to destination.

36. Northern Pacific Ry. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

41-A, Union Pacific R. R. Granger, Wyo., Oregon Short Line R. R., Huntington, Ore., Oregon Railroad & Navigation Co., Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

41-B, Chicago, Rock Island & Pacific Ry. to Pullman, Colo., Union Pacific R. R., Granger, Wyo., Oregon Short Line R. R., Huntington, Ore., Oregon Railroad & Navigation Co. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

41-C, Chicago, Burlington & Quincy R. R. or Atchison, Topeka & Santa Fe Ry. to Denver, Colo., Union Pacific R. R., Granger, Wyo., Oregon Short Line R. R., Huntington, Ore., Oregon Railroad & Navigation Co. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

44. Union Pacific R. R., or Chicago, Burlington & Quincy R. R. to Denver, Colo., or Chicago, Rock Island & Pacific Ry. to Denver, Colorado Springs, or Pueblo, Colo., in connection with Denver & Rio Grande R. R. to Salt Lake City, Utah, Oregon Short Line R. R., to Huntington, Ore., Oregon Railroad & Navigation Co. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination, or Union Pacific R. R., or Chicago, Burlington & Quincy R. R. to

29 Denver, Colo., or Chicago, Rock Island & Pacific Ry. to Denver, Colorado Springs or Pueblo, Colo., in connection with Colorado Midland Ry. and Denver & Rio Grande R. R. to Salt Lake City, Utah, Oregon Short Line R. R. to Huntington, Ore., Oregon Railroad & Navigation Co. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

66. Via El Paso, Tex., or Deming, N. M., or via Bakersfield, Fresno or Stockton, Cal., thence via Southern Pacific Co. (Pacific System and Lines in Oregon).

And it is also provided on page 26 of said Tariff, as follows:

N. B.—(Applies only on traffic routed via Gateway 66 designated on page 34.) When no specific through rate or specific method of making through rate, to intermediate points on line of Southern Pacific Co., named on pages 24 and 25, is provided, the rate to such intermediate points will be made by adding to the Terminal rate shown as applying to the points designated as "Terminals," viz: Portland or East Portland, Ore., whichever is nearest point of destination of shipment, the local rate published for use upon Interstate

traffic from such nearest "Terminal" point named to point of destination.

And therefore your orators allege and show that the through interstate rate from Eastern shipping points to points on Southern Pacific Company, Lines in Oregon, except as otherwise provided, are made by adding to the terminal rates shown as applying to the points designated as terminals, by way of Portland or East Portland, Oregon, the local rate published for use upon interstate traffic, which said local rates are present class rates from such terminal points named, viz. Portland and East Portland, to points of destination, and such interstate traffic may be transported from said Eastern points to destination by way of El Paso, Texas, or Deming, New Mexico, or via Bakersfield, Cal., Fresno, Cal., or Stockton, Cal., thence via Southern Pacific Company, Pacific System, Lines in Oregon, and as illustrating such movement, your orators show that the present through rates on syrup from New York City, New York, to Eugene, Oregon, are made by adding to the terminal rates shown in Transcontinental Freight Bureau, West-Bound, Tariff No. 4-H, as aforesaid, namely, \$1.25 per 100 lbs. less than carloads, and \$.85 per

100 lbs. carloads, the local class rates governed by Western
30 Classification No. 48, from Portland or East Portland to Eugene, of \$.36 per 100 lbs. less than carloads, and \$.33 per 100 lbs. carloads, making through rates of \$1.61 per 100 lbs. less than carloads, and \$1.18 per 100 lbs. carloads. And shipments may move via any one of the routes designated as 32-A, 36, 41-A, 41-B, 41-C, 44, or 66. And your orators show and allege that the effect of the said pretended order of the said Railroad Commission, F-125, if put into effect on the through interstate rate on syrup from New York to Eugene, would reduce the less than carload rate from \$1.61 per 100 lbs. to \$1.53 per 100 lbs., and reduce the carload rate from \$1.18 per 100 lbs. to \$1.08 per 100 lbs. by reducing the local rates published for use upon interstate traffic from Portland and East Portland to Eugene, from \$.36 per 100 lbs. less than carloads, and \$.33 per 100 lbs. carloads, to \$.28 less than carload and \$.23 per 100 lbs. carload, respectively.

And your orators would further show and allege by way of illustration of the effect of the said pretended order of said Railroad Commission, if allowed to go into effect as applied to interstate rates, that interstate traffic is moved under Southern Pacific Company (Pacific System, and Oregon Lines) Local, Joint and Proportional Freight Tariff No. 162-B, I. C. C. No. 3367, which names local, joint and proportional class and commodity rates between San Francisco, Oakland, Oakland Wharf, Stockton, San Jose, Marysville, Sacramento and other points in California and Nevada on lines of Southern Pacific Company, Pacific System, and Portland, Oregon, East Portland, and other points in Oregon on Lines of Southern Pacific Company, which tariff was effective September 11, 1910, and on file with the Interstate Commerce Commission, which said Tariff must be observed by your orators and their connecting carriers affected thereby, and is an interstate tariff naming through rates from
31 San Francisco and points named, to points on Southern Pacific Company, Lines in Oregon, using competitive ocean

rates to Portland and East Portland, plus class rates from Portland and East Portland to destination.

And your orators pray that the court will take judicial notice and knowledge of the said Tariff last hereinabove described, as if the same were fully written herein and made a part of this bill of complaint.

And your orators allege and show that in the third column of said Tariff is shown the basing rate to Portland, Ore. (Park St.) to be used only for basing purposes in conjunction with rates to points south of Portland (Park St.) Ore., shown on pages 60 to 64 inclusive, except as otherwise provided, and that the rates shown on pages 60 to 64 inclusive are present class rates from Portland, Oregon, to all points on Southern Pacific Company, Lines in Oregon, except to points competitive with Willamette River steamers, such as Salem, Independence, Albany & Corvallis. The class rates shown are one cent per 100 lbs. lower than regularly published class rates from Portland and East Portland, to Salem, Independence, Albany and Corvallis. And thereabout, your orators show and allege, that taking the rates on syrup for example, the present rates from San Francisco to Eugene are \$.71 per 100 lbs. less than carload, and \$.44 $\frac{1}{4}$ per 100 lbs. carloads, which are made by combining on Portland, using the ocean rate San Francisco to Portland, plus the local class rates Portland to Eugene, and therefore your orators aver and allege that the effect of the Commission's order F-125 would be to reduce the less than carload rate on syrup from San Francisco to Eugene, from \$.71 per 100 lbs. to \$.63 per 100 lbs., and to reduce the carload rate on syrup from \$.44 $\frac{1}{4}$ per 100 lbs. to \$.34 $\frac{1}{4}$ per 100 lbs., a reduction in the carload rate of 23%, notwithstanding that rail service involves a haul of 648 miles from San Francisco to Eugene.

Your orators would further show and allege that there is a Southern Pacific Company (Pacific System, and Oregon Lines) Local Freight Tariff No. 161, I. C. C. No. 3021, naming class rates for transportation of freight between San Francisco, Oakland, Stockton, San Jose, Niles, Sacramento and Marysville, Cal., also other points on lines of the Southern Pacific Company in California, as shown therein,—and Portland and East Portland and other points on lines of the Southern Pacific Company in Oregon, as shown therein, effective July 1st, 1908, which said Tariff your orators pray that the court will take judicial knowledge and notice of, as if the same were fully written herein, and which said Tariff contains the names of over 200 stations in California, from which direct through class rates apply to points on Southern Pacific Company, Lines in Oregon. All of which class rates, except as between Northern California and Southern Oregon points, are made by combining on San Francisco and Portland, using the low ocean rates between San Francisco and Portland to make the through rate from point of origin to point of destination, and that in addition to the interstate tariffs heretofore mentioned, your orators particularly show Tariff called Southern Pacific Company (Pacific System, and Oregon Lines) Local and Joint Freight Tariffs No. 577, I. C. C. No. 3250, effective

September 24, 1909, naming rates for transportation of sugar from San Francisco, Oakland, San Jose, Sacramento, Stockton, and 200 other points in California on lines of Southern Pacific Company, to Portland, East Portland, Oregon, and other points in Oregon on lines of Southern Pacific Company, and that thereby also direct through rates are shown in this tariff from points of origin to point of destination, and are made by adding to the ocean rates from San Francisco to Portland, the class rates from Portland to destination.

Your orators also allege and show that there is a Southern Pacific Co. (Pacific System, and Oregon Lines) Local and Joint Freight Tariff No. 578-A, I. C. C. No. 3297, effective September 17, 1909, naming rates for transportation of sale from San Francisco, Oakland, San Jose, Stockton, Sacramento, and 200 other points in California on lines of Southern Pacific Company, to Portland, Oregon, and other points in Oregon on lines of Southern Pacific Company, which said tariff is duly filed with the Interstate Commerce Commission, and of which your orators pray that the court may take judicial notice and knowledge, as if the same were fully written herein; and by which tariff direct through rates from point of origin to point of destination are shown, which are likewise made by adding to the ocean rates from San Francisco to Portland, the class rates from Portland to destination.

X.

Your orators further complain, allege and say that on June 30, 1909, and since, the capital stock of the Oregon & California Railroad Company consisted of preferred stock of the par value of \$12,000,000 and common stock of the par value of \$7,000,000, and there was outstanding at that date, and since, bonded indebtedness secured by first mortgage upon the property of the said Oregon & California Railroad Company, in bonds of the par value of \$17,745,000, and there was due Southern Pacific Company, in the operation of said properties of the Oregon & California Railroad Company under the lease to said Southern Pacific Company, as a deficit, the sum of \$3,207,008.37 after applying all of the receipts from the operation of said properties to the payment of operating expenses, taxes, interest on bonded debt, and other reasonable and legitimate expenses necessarily attending the operating of said properties, which said deficit was on June 30, 1906, the sum of \$6,222,037.2-; that the said capital stock of the Oregon & California Railroad Company, so outstanding as aforesaid, represents to the extent of \$12,000,000 thereof the bonded and other indebtedness of a portion of said properties outstanding at or about the time of the completion of the first 198 miles of said railroad from Portland to Roseburg, which said sums were used by said Oregon & California Railroad Company for construction of said railroad or redemption of valid outstanding bonds, from which were received funds that entered into the construction of said property, and that at said date there was accrued upon said outstanding indebtedness, interest aggregating \$7,000,000 that had accrued upon said bonded and other

indebtedness and was due the creditors of said Oregon & California Railroad Company, and that said common stock of the par value of \$7,000,000 was issued in payment of said unpaid accrued interest; that the said bonded indebtedness so outstanding and secured by first mortgage of July 1, 1887, executed by the Oregon & California Railroad Company to the Union Trust Company of New York, was created for the purpose of reducing part of the outstanding indebtedness of the said Oregon & California Railroad Company and for the purpose of construction, extension, addition and betterment to the property of said Oregon & California Railroad Company, as original capital, and was used in the extension, construction and betterment of said properties or any redemption of valid outstanding bonds then existing against said properties as security for moneys that had theretofore gone into the acquisition or construction or betterment of said properties, so that on September 21, 1910, when the said

35 Railroad Commission of Oregon attempted to make said pretended order, as aforesaid, the said Oregon & California Railroad Company was the owner of the said lines of railway and other properties used in connection therewith, and the same was then and there under lease to the Southern Pacific Company of date July 1, 1887, and subsequent modifications thereof, whereby said Southern Pacific Company was given the right to possess, maintain, operate and use the said properties and to receive the rents, uses and benefits thereof for the term of forty years from July 1, 1887; that by the terms of said lease it was provided that the said Southern Pacific Company would keep the said leased property in good order, condition and repair, operate, maintain, add to, and better the same at its own expense, pay all taxes legally assessed against the same, or levied thereon, and pay the interest as it should mature on such of the first mortgage bonds of said Oregon & California Railroad Company secured by said mortgage of date July 1, 1887, executed to the Union Trust Company of New York, as might be issued in respect of the then existing lines of the Oregon & California Railroad Company or of the extension then under construction of its main line to the boundary between Oregon and California, or as might be thereafter guaranteed by said Southern Pacific Company, and that it would, on the first day of May in each year during the continuance of said lease, pay to the Oregon & California Railroad Company such balance, if any, of the net earnings or income received by said Southern Pacific Company from said leased premises with the appurtenances for the year ending on December 31st next preceding, as should remain in its hands after all charges and expenses incurred by the said Southern Pacific Company under said lease and all payments for taxes and interest and all current fixed charges of the Oregon & California Railroad Company and all indebtedness of said Oregon & California Railroad Company to said Southern Pacific Company are paid. And by which lease it

36 was further provided that if such balance of net earnings or income received by said Southern Pacific Company from said leased premises for any year, which by said lease would be and become payable by said Southern Pacific Company to said Oregon

& California Railroad Company, should exceed the amount of seven percentum upon the par value of the then existing preferred stock of the Oregon & California Railroad Company, and six per cent per annum upon the value of the then existing common stock of said Oregon & California Railroad Company, then and in that event said Southern Pacific Company should be entitled to and should retain to itself for its own use any and all excess of such balance of net earnings and income over and above the amount of seven per cent per annum upon the par value of the preferred stock and six per cent per annum upon the par value of the common stock of said Oregon & California Railroad Company. That in and by said lease it was further agreed that the Southern Pacific Company would guarantee the payment of the principal and interest of such of the bonds of the issue mentioned in said lease as might be issued in respect of the then existing lines or the extension then under construction of its main line to the boundary between Oregon and California and such further bonds of said issue as the Oregon and California Company might during the existence of said lease request the Southern Pacific Company to guarantee.

That thereupon and on July 1, 1887, the said Southern Pacific Company entered into the possession of the then existing railroad and appurtenances thereunto belonging then owned by the Oregon & California Railroad Company and as such continued to be and remained in the possession of said property and of all extensions and additions and renewals thereof under said lease and amendments thereof, and has honestly and faithfully and carefully kept

37 a full account of the gross operating revenues, receipts and income of said property, and every part thereof, and has carefully and honestly and faithfully kept an account of all the expenditures incident to said property, including operating expenses, taxes, and interest upon bonded indebtedness, and other reasonable and necessary expenses, and that notwithstanding the said Southern Pacific Company has so operated the said properties under said lease, and the same has been honestly, economically and carefully managed and operated, the said properties have never at any time yielded any net income applicable to the payment of dividends upon said capital stock or any part thereof at any time during said lease, and the said properties do not now yield, under existing rates and tariffs, any net revenues from which any payment can be made by way of dividend upon said capital stock or any part thereof. That notwithstanding the faithful, careful and economical management and administration of said properties by said Southern Pacific Company under reasonable tariffs for the movement of freight and passenger traffic during all of said time, there was a constantly increasing deficit, resulting from said operation, due and owing to the Southern Pacific Company, and the same reached, on June 30, 1906, the extraordinary figure and sum of \$6,222,037.2-, which sum was reduced for the year ending June 30, 1909, to the sum of \$3,227,008.37, as aforesaid, and if existing rates, state and interstate, upon freight and passenger business, are permitted to remain in effect, and traffic and business continue to improve, said deficit will be grad-

ually reduced hereafter so that a fund may be created with which to retire a portion of said outstanding bonded indebtedness or at the election of said Oregon & California Railroad Company to be distributed in dividends upon said stock.

Your orators further show and allege that the properties of the Oregon & California Railroad Company are of the reasonable value of a sum representing the outstanding bonded indebtedness and the deficit, as aforesaid and of the capital stock of said company, and that your orators are entitled to receipts and earnings from the operation of said properties sufficient to pay a reasonable and fixed sum as annual interest upon said indebtedness and as a dividend upon said stock amounting to at least five per cent. per annum upon said bonded indebtedness and at least six per cent. per annum upon said unsecured indebtedness and a dividend of at least six per cent. or seven per cent. per annum upon said capital stock.

Your orators further allege and show that the receipts and disbursements of said property under said lease for the year ending June 30, 1902, and to the year ending June 30, 1909, are as follows:

Receipts.

Year ending June 30, 1902,	gross earnings.....	\$3,509,901.37
" " " 1903,	" "	4,004,983.14
" " " 1904,	" "	4,308,215.05
" " " 1905,	" "	4,390,401.10
" " " 1906,	" "	5,891,087.67
" " " 1907,	" "	6,451,050.00
" " " 1908,	" "	6,918,414.00
" " " 1909,	" "	7,104,081.00

Disbursements.

" " " 1902,	expenditures.....	3,734,380.40
" " " 1903,	" "	4,120,413.08
" " " 1904,	" "	4,319,970.87
" " " 1905,	" "	5,321,301.39
" " " 1906,	" "	5,956,399.61
" " " 1907,	" "	6,128,729.00
" " " 1908,	" "	5,968,601.00
" " " 1909,	" "	5,839,698.00

Your orators further show that the operating revenues for the year ending June 30, 1909, amounted to the sum of \$6,998,949.57, of which \$2,915,434.70 were intrastate and \$3,804,613.65 were interstate; that the intrastate passenger revenue was \$1,507,107.24 and interstate passenger revenue \$1,606,131.95; that the intrastate freight earnings were \$1,321,216.72, while the interstate freight earnings were \$2,168,825.86 and that by reason of the premises your orators aver and allege that the interstate freight business is about sixty-four per cent. more than the

intrastate freight business, and thereabout your orators aver and allege that if the pretended order of the Railroad Commission of date September 21, 1910, shall go into effect, your orators will suffer an annual loss of intrastate business, upon business affected by said order, to the amount of \$120,859.32 and will suffer an annual loss of intrastate and interstate business combined, necessarily and directly affected by said order, to the amount of \$156,072.48, amounting in the aggregate to the sum of \$276,931.80.

And your orators further allege and show that the existing local rates affected by said order of September 21, 1910, are reasonable and just and are made as low as the situation of said properties and the competitive conditions of the business, both intrastate and interstate, will permit or allow, and the said compensation charged upon said existing tariffs is reasonable and just and affords to your orators but slight compensation above the cost of the service; that the said decrease attempted to be made by said pretended order, involving said class rates hereinbefore set out, if enforced will deprive your orators of said large sums of annual revenues and compel them to give the use of said properties without reasonable or just compensation for such services and will deprive your orators of the said properties without due or reasonable compensation, and will compel your orators to increase other rates upon traffic not affected by said order, and particularly the products of the soil—forest and farm, many of which now receive and enjoy terminal rates, including such commodities to be sold and consumed
40 in the markets of the world, thereby compelling your orators to discriminate against such last named products to the great injury of your orators and of the public.

Your orators further allege and show that the largest decrease in said class rates affects class 4 and 5, and that under said classes, consisting of staples, particularly groceries and hardware, are largely moved both intrastate and interstate, and that the decrease as to such commodities under such classes, so attempted to be made by said order, approximate about twenty per cent of the existing rates, and that the said decrease will be largely, if not mainly, of benefit only to jobbers and dealers in such staple products, and your orators aver and allege that the said dealers and jobbers in said commodities, during several years last past, have made and are now making large and excessive profits under said existing class rates and that the said pretended order, if put into effect, will still further increase the profits of said dealers and jobbers at the expense of your orators and of the public at large.

XI.

Your orators further complaining allege and show that on June 30, 1909, the Oregon & California Railroad Company owned 666.07 miles of main line track, beside 114.06 miles of side track, with the usual stations and terminals incident to operation, all of which property is devoted to public use and upon which your orators are entitled to just and reasonable return and upon which your orators have never received, for the stockholders of the Oregon & California Railroad Company, anything in dividends; that the said prop-

erties are so situated physically that your orators are compelled to maintain and operate one line of railroad from Portland to Corvallis

by way of Forest Grove, and another line of railroad from
41 Jefferson Street in the City of Portland by way of Newberg,

Yamhill County, McMinnville and Dallas to Airlie in Polk County, Oregon, with a branch line from Sheridan Junction, Oregon, in Yamhill County, Oregon, to Sheridan, which said lines lie West of the Willamette River and closely parallel to the same, and come in competition not only with common carriers on said Willamette River but with the main and branch lines of your orators situated on the East side of the Willamette River in said State; that your orators have been compelled to maintain and operate a main line from Portland to the boundary line between the states of Oregon and California, through Salem, Albany, Eugene, Roseburg, Grants Pass, Medford and Ashland, over two mountain ranges in a mountainous, difficult and expensive country in which to operate and maintain railroads, and particularly over the Siskiyou Mountains for all interstate business coming from or going to California points and all points beyond. And at the same time your orators have been compelled to operate and maintain a branch line from Woodburn to Natron in Lane County, Oregon, a distance of about 93 miles, practically in competition with the main line of your orators and in competition with common carriers on the Willamette River to points as far South as Albany and Corvallis in said State; that the said four lines of railroad so operated and maintained are situated geographically within the first 125 miles South from Portland in a valley or country not exceeding 60 miles in width with a navigable river in the center thereof, navigable for common carriers by boat to Albany and Corvallis aforesaid, in open and active competition with your orators; and that in addition to the foregoing physical situation of the properties of your

42 orators the said City of Portland is located on the Willamette River 12 miles from the Columbia River and at the head of ocean navigation for deep sea and coast-wise vessels owned by common carriers engaged in the business of carrying freight and passengers from San Francisco, Los Angeles and other Pacific Ocean ports to Portland in competition with the business of your orators. And your orators further show and allege that in addition to the competition hereinbefore described the Oregon Electric Railway Company is actively operating and maintaining in competition with the line of railroad of your orator an interurban electric line for the carriage of freight and passengers from Portland to Salem and from Portland to Forest Grove with trans-continental connection with the Great Northern Railway Company and the Northern Pacific Railway Company having terminals at Portland; and said Oregon Electric Railway Company is about to extend its interurban line to McMinnville, Yamhill County, Oregon, and to Albany, Linn County, Oregon, and to Eugene, Lane County, Oregon, and will thereby subject your orators to active and close competition for all lines of business.

And your orators further allege and show that approximately the

less than carload merchandise tonnage received at points on lines of the Southern Pacific Company in Oregon for one year is 99,264 tons, yielding a revenue of \$777,984.00, all of which will be directly affected by the application of class rates, and there is upon said one year's business approximately 15,203 tons of carload commodities yielding a revenue of \$210,888.82 that will likewise be affected by the application of said class rates, or a total of 114,467 tons yielding a revenue of \$1,088,872.82 or about 39% of the total tonnage and 74% of the total revenue, the whole of which is upon freight received; that the total freight revenue for the year ending June 30, 1909, was \$3,490,042.58, of which \$1,088,872.82 was revenue derived from freight received affected by the application of class rates amounting to 31% of the total freight revenues of your orators, the Southern Pacific Company and the Oregon & California Railroad Company; Your orators further show and allege that the percentage of forwarded traffic affected by class rates, for which your orators at this time can give no accurate figures, would materially increase this percentage.

XII.

Your orators further allege and show that the Oregon & California Railroad Company was so incorporated under the laws of the State of Oregon on March 16, 1870, and that all of the railroad properties by it constructed, acquired and now owned, were constructed, acquired and owned pursuant to its articles of incorporation, and the articles of incorporation under the laws of the State of Oregon, of its predecessors in interest and under and by virtue of the constitution of the State of Oregon and the laws of said State, and particularly of Section II, Article XI of the constitution of said State, and Section XXXVI of Chapter VII of the Miscellaneous laws of the State of Oregon, being Section XXXIV of the Act of the Legislative Assembly of the State of Oregon approved October 14, 1862, being an act providing for private corporations and the appropriation of private property therefor, which said Section II Article XI of the Constitution of said State is as follows:

"Corporations may be formed under general laws but shall not be created by special laws except for municipal purposes.

"All laws passed pursuant to this section may be altered, amended or repealed, but not so as to alter or destroy any vested corporate rights," and which said Section XXXIV of said act of the

44 Legislative Assembly approved October 14, 1862, is as follows:

"Every corporation formed under this act for the construction of a railroad, as to such road shall be deemed common carriers, and shall have power to collect and receive such tolls or freights for transportation of persons or property thereon as it may prescribe."

That by virtue of said articles of Incorporation the Oregon & California Railroad Company and its predecessors in interest incorporated under the laws of the State of Oregon, each of which said railroad companies was formed under said act for the construction of railroads in the State of Oregon, the said Oregon & California

Railroad Company became vested with the right to collect and receive such tolls or freights for transportation of persons or property on said railroads as said Oregon & California Railroad Company might prescribe; and that thereunder the Southern Pacific Company by virtue of the said lease and amendments thereto succeeded to all the franchises and rights of the said Oregon & California Railroad Company and its predecessors in interest under said articles of incorporation and under said constitution and statutes aforesaid; and that the said pretended Railroad Commission Act hereinabove referred to and the said pretended order of the said Railroad Commission are, and each of them is, in violation of said Section II Article XI and of said Section XXXIV of the said Act of the Legislative Assembly approved October 14, 1862, and impairs the vested rights of your orators in violation of the constitution of the State of Oregon and in violation of the constitution of the United States, in that the said pretended Railroad Commission Act and the said pretended order of commission impair the obligation of the contract made with your orators under the said provision of the constitution of the State of Oregon and the said Section

45 XXXIV of said Act as aforesaid, and under the said Articles of Incorporation of the Oregon & California Railroad Company and its predecessors in interest.

XIII.

Your orators further show and allege that by said Railroad Commission Act no adequate or proper remedy has been given or provided for the protection of your orators against the unjust or unlawful enforcement of the said pretended order of September 21st, 1910, so attempted to be made by the said Railroad Commission of Oregon; that in and by said Railroad Commission Act it is provided by Section 51 thereof as follows:—

"If any railroad shall do or cause to be done or permit to be done any matter, act or thing in this Act prohibited, or declared to be unlawful, or shall omit to do any Act, matter or thing required to be done by it, such railroad shall be liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of such violation together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case; provided, that any recovery as in this section provided shall in no manner affect a recovery by the State of the Penalty prescribed for such violation, and that the damages provided in Section 26 hereof, awarded the aggrieved party by reason of cars not being furnished when applied for shall be in lieu of the treble damages awarded by this section."

That by Section 33 of said Railroad Commission Act as amended February 23rd, 1909, it is provided as follows:—

"After the commencement of such suit, the Circuit Court may for cause shown upon application to the circuit court or presiding judge thereof, and upon notice to the commission, and hearing,

suspend or stay the operation of the order of the commission complained of until the final disposition of such suit, upon the giving of such bond or other security and upon such conditions as the court may require; and if such order of injunction suspends the order or requirement of the commission fixing rates, then the court shall require a bond with good and sufficient surety conditioned that the railroad or railroads applying for such injunction shall answer for all damages caused by the delay in the enforcement of the order of the commission and all compensation for whatever sums for transportation any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of the commission had not been suspended; and such bond shall cover the periods transpiring from

time of the issuance of any such injunction until the final
46 determination of the question litigated. The said bond shall be executed in favor of the Railroad Commission of Oregon for the benefit of whom it may concern and shall be enforceable by said commission or any person interested in an appropriate proceeding. Any person paying charges found to be excessive shall have a claim for the excess, whether paid under protest or not, and unless refunded within thirty days after written demand made after final judgment, may recover the same by action against such railroad or such railroad and the sureties on such bond. Claims of persons for money collected in excess of the amount payable under the rate or rates established by the commission shall be assignable in the same manner as any chose in action. No appeal to the Supreme Court shall stay the operation of any order of the commission unless the circuit or Supreme Court shall so direct, and unless the railroad so appealing shall give a bond with like conditions and terms as that given or granting injunctions suspending an order of the commission fixing rates."

And thereby your orators allege and aver that the said Railroad Commission Act is oppressive and confiscatory and affords to your orators no adequate or sufficient remedy to protect the property of your orators, and that the provisions of said act are not uniform and are unequal in their application to the various persons and transportation companies affected thereby; and that by the terms of said Commission act your orators are subjected to excessive penalties in the event your orators should refuse to obey or observe the said pretended order of said Railroad Commission or other like orders, and the said act and the said order each deny to your orators and each of them the equal protection of the laws, and deprive them and each of them of their property and the property of each of them without due process of law, and the said Railroad Commission Act and Order are, and each of them is by reason of the premises unconstitutional and void.

Your orators further show and allege that by Section 1 of Article 3 of the constitution of the State of Oregon it is provided as follows:—

"The powers of the government shall be divided into three separate departments,—the legislative, the executive, including the admin-

47 istrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided."

That in and by said Constitution of Oregon it is nowhere expressly or otherwise provided that any commission shall be created having powers, duties or functions attempted to be conferred upon said Railroad Commission of Oregon by said Railroad Commission Act and amendments thereto, or any of such powers, duties or functions, and there is attempted to be conferred by said Railroad Commission act and amendments thereto upon said defendants Campbell, Aitchison and West, constituting the Railroad Commission, of the State of Oregon, legislative, executive and judicial powers, and there is conferred upon them both legislative and judicial powers, and legislative and administrative powers and there is also conferred upon them judicial and administrative powers, giving and granting unto said Railroad Commission by Section 22 of said act power upon investigation of an existing rate or classification to determine that said rate or classification is unreasonable, and power to fix and substitute therefor such rate or classification as it shall have determined to be just, thereby conferring upon said commission judicial powers, and thereby conferring upon said commission authority to fix and establish a new rate for the future, and thereby giving to said commission authority to legislate upon said subject, and thereby exercising legislative functions; and by section 30 of said act it is further provided that said commission may establish a joint rate and provide for its apportionment between the carriers over whose lines the rate applies; and your orators allege that the establishment of any such joint rate is a legislative act and that the apportionment of such joint act is a judicial act. And your orators further show that by

48 Section 23 of said act it is provided that when ordered by the commission, carriers shall erect station houses at intersections of railroads, and that railroads shall keep such depot warm, lighted and open for a reasonable time before the arrival and after the departure of passenger trains; and your orators show and allege that said order would be a legislative act, and prescribing the time during which such depot or station shall be kept open before and after the arrival of trains would be an administrative act. That the said Railroad Commission Act in divers and other ways attempts to confer upon said commission and the members thereof, administrative, judicial and legislative powers, and the said Commission in attempting to make the said order of September 21st, 1910, and directing when it should take effect, exercised judicial and legislative functions in violation of said Section 1 Article 3 of the Constitution aforesaid, and that by reason of the premises said Railroad Commission Act with the amendments thereto is unconstitutional and void.

XIV.

Your orators further aver and show that the said defendants Thomas K. Campbell, Clyde B. Aitchison and Oswald West, as such railroad commission threaten, pursuant to the authority of Section

57 of the said Railroad Commission Act, to apply to the defendant, A. M. Crawford, as Attorney General of the State of Oregon, to institute an action or, proceedings for the recovery of the penalties provided for by said act, should your orators or either thereof fail or refuse to comply with each and all of the terms, provisions and conditions in the said pretended order. And your orators further show and aver that the said A. M. Crawford, as Attorney General of the State of Oregon, threatens to and will institute such action or proceeding against your orators or either thereof, to recover said penalties, and that all of said defendants are threatening to and

49 will, unless restrained by this Honorable Court, institute proceedings against your orators and particularly against the Southern Pacific Company, its officers, directors, agents and employees, to compel said Southern Pacific Company to publish and put into effect the rates prescribed in the said order of September 21st, 1910; and that said proceedings will thereby compel complainants to observe and put into effect rates prescribed in said order, causing complainants great and irretrievable loss and damage, and divesting complainants of their property without due process of law, and confiscating to the use of the public the property of the complainant in excess of about \$300,000.00 per annum, and will expose your orators and particularly the Southern Pacific Company to the danger of excessive fines and penalties provided for in said Act, and will in effect confiscate the property of your orator and compel your orators, the Southern Pacific Company, its officers, directors and agents to put into effect rates and regulations governing and affecting interstate traffic passing over the lines of railroad of your orators, and the other railroads hereinabove mentioned, contrary to the provisions of the act of Congress approved February 4th, 1887, entitled "An Act to Regulate Commerce", and the amendments thereto, and the regulations of the Interstate Commerce Commission made pursuant thereto and contrary to the terms, provisions, tariffs and regulations prescribed by and now appearing in the tariffs hereinbefore issued by your orators, the Southern Pacific Company, and other carriers engaged in interstate commerce and which were concurred in by other railroads hereinbefore mentioned and which have been duly filed with the Interstate Commerce Commission and are now in full force and effect. And your orators further show and allege that

50 unless restrained and enjoined from so doing the defendants and each of them threaten to and will subject your orators to liability of paying fines and penalties in such sums as will confiscate the property of your orators and will subject your orators, through the loss of traffic and earnings therefrom, to great and irretrievable loss, damage and injury.

XV.

And your orators allege and show that the said order of the said Railroad Commission of Oregon is void and of no force and effect in this:

(a) That thereby the shippers and other persons who may avail themselves of the said class rates so attempted to be ordered into

effect, will take the property of your orators for private use without just or any compensation, and without the consent of your orators, in violation of Section 18, of Article I of the Constitution of Oregon, which provides that private property shall not be taken for public use, nor the particular services of any man be demanded without just compensation, nor, except in case of the state without such compensation first assessed and tendered.

That said order of said Railroad Commission is unreasonable, unjust and arbitrary, and particularly in this: that if the same is enforced, it will deprive the Southern Pacific Company of earnings to the amount of nearly \$300,000 annually, which it is entitled to collect and receive in excess of the revenues that would be derived from the enforcement of said order, so as to enable your orators to receive a just and fair return upon the property of your orators.

(b) Said Railroad Commission Act is void and of no force and effect in this: That it is an attempt to give to said defendants Campbell, Aitchison and West, collectively known as "Railroad Commission of Oregon", jurisdiction, power and authority to exercise legislative, executive and judicial powers, contrary to and in violation of Section 1, of Article III of the Constitution of the State of Oregon, which provides that: "The powers of the government shall be divided into three separate departments,—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duty under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided."

(c) Said Railroad Commission of Oregon, in passing upon said class rates upon its own initiative, and hearing the testimony of shippers, and in taking said testimony in relation thereto, attempted to and did exercise judicial functions; and in making said order, exercised legislative and judicial functions; both and each in violation of said Section 1 Article III, as aforesaid.

(d) Said Railroad Commission Act is void and of no force and effect in this: that it violates Section 21, Article I, of the Constitution of the State of Oregon, which provides that: "No ex post facto law, or law impairing the obligations of contracts, shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution: Provided, that laws locating the capital of the State * * * may take effect or not, upon a vote of the electors, interested."

(e) Said Railroad Commission Act is void and of no force and effect in this: that it violates Section 21, Article I, of said Constitution of Oregon, in this: that it is expressly provided that the said Railroad Commission of Oregon shall have and exercise authority which, when exercised, shall take effect upon their orders, and not by virtue of any law passed by the Legislative Assembly of the state.

(f) Said Railroad Commission Act is void and violative of the Constitution of the State of Oregon in this, that it violates Section 1, Article VII, which provides that: "The judicial power of the State

shall be vested in a Supreme Court, Circuit Courts, and County Courts, which shall be courts of record, having general jurisdiction, to be defined, limited and regulated by law, in accordance with this Constitution," and particularly in this, that the said Act undertakes to deprive the complainants and all other persons of their right to contest in the courts of the state, authorized by said Section 1, Article VII, or of any court other than in the Circuit Court of the State of Oregon, for Marion County; and that the said Act is a denial to complainants and other persons of the equal protection of the laws, and deprives the complainants and other citizens of other states of the right to litigate their cause of suit in the courts of the United States, and as such is violative of the Fourteenth Amendment to the Constitution of the United States, which, among other things, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Your orators further say that the said order of the said Commission so attempted to be made on September 21, 1910, is void and of no force and effect, in this: that if enforced it will deprive your orators of their property without due process of law, and will prevent your orators from receiving a just or any return upon their properties sufficient to enable your orator the Oregon & California Railroad Company to pay to its stockholders any return or dividend upon any of its capital stock whatsoever.

(g) Said Railroad Commission Act is void and of no force and effect in this: that it violates Article I, Section 8, paragraph 3, of the Constitution of the United States, which provides: "Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and is violative of Article I, Section 18, of the Constitution of the United

53 States, which provides: "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof," and particularly in this: that the said act of the Legislative Assembly of the State of Oregon attempts to confer upon the Railroad Commission of Oregon jurisdiction over interstate commerce, and does not limit its power and authority to commerce wholly within the State of Oregon; and particularly, further, in this, that the said Railroad Commission Act necessarily attempts to and does confer upon the said Railroad Commission authority and power to take into consideration, in determining and fixing any rate for the carriage of freight or passengers upon the lines of your orators within the State of Oregon, the earnings of the said complainants derived from interstate traffic.

(h) Said order so attempted to be made as aforesaid, on Septem-

ber 21, 1910, is void and of no force and effect in this: that said order, if enforced, would violate Article I, Section 8, paragraph 3, of the Constitution of the United States, hereinbefore set out, and would violate Article I, Section 18, of the Constitution of the United States, hereinbefore set out, and would be in conflict with the Act of February 4, 1887, entitled, "An Act to regulate commerce," and the amendments thereto, and particularly the "Act to regulate commerce," as amended June 18, 1910, in this, that the said order directly, materially and substantially affects the rates upon practically all the interstate shipments of your orators.

(i) Said Railroad Commission Act is void and of no force and effect in this: that it provides for excessive, unusual penalties, fines and punishments, and thereby deprives the complainants and other common carriers and other citizens of the United States of the
54 equal protection of the laws, and thereby takes property of the complainants without due process of law.

(j) Said Railroad Commission Act, and the said pretended order of September 21, 1910, and each thereof, is void and of no force and effect in this: that the same is violative of Section 10, of Article I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, and particularly in this, that the said Railroad Commission Act and the said pretended order are and each of them is violative of the contract rights of your orators under the Articles of Incorporation of the Oregon & California Railroad Company and its predecessors in interest, and under the constitution and laws of the State of Oregon, and particularly under Section 2, Article XI of the Constitution of the State of Oregon, and Section 36 of Chapter 7, of the Miscellaneous Laws of the State of Oregon, being Section 34 of the Act of the Legislative Assembly, approved October 14, 1862, providing for private corporations and the appropriation of private property therefor, hereinbefore specifically set out.

(k) Said order is void and of no force and effect in this: that the pretended reduction of said class rates is based upon the arbitrary approval of Class 1 now in effect by your orator, Southern Pacific Company, and an arbitrary spread between said class rates, adopting the arbitraries of 100% for first class, 85% of first class for second class, 70% of first class for third class, 60% of first class for fourth class, 50% of first class for fifth class, 50% of first class for Class A, 40% of first class for class B, 30% of first class for Class C, 25% of first class for Class D, and 20% of first class for Class E, which said arbitrary classification and spread, and each thereof,
55 was adopted by the said Railroad Commission in making said pretended order, and was so adopted arbitrarily and without any reference to the distance such traffic should be moved, or the character or nature of the traffic, or the service to be performed, or the compensation that should be paid therefor, and said classification is capricious and not based upon any fair consideration.

And your orators further show that under said arbitrary spread, or the application of said percentage to said class rates, the largest

reduction is effective at points on said lines more difficult and expensive to operate by reason of mountain chains and physical difficulties.

(l) Said pretended order is void and of no force and effect in this: that the rates sought to be prescribed by said order, in lieu of existing rates, are confiscatory of the property of your orators, and will deprive your orators of their property without compensation, and without due process of law.

XVI.

And your orators further show that the complainants have no plain, speedy or adequate remedy at law, and can have no adequate relief except in this court, and that unless restrained the said Railroad Commission of Oregon, and particularly the said defendants, will attempt to enforce said pretended order, and to prosecute or cause to be prosecuted divers and sundry actions against the complainant Southern Pacific Company to recover the penalties provided by said Act of the Legislative Assembly aforesaid, and will subject the complainants, and particularly the Southern Pacific Company, to a multiplicity of suits or actions in respect to the same.

Whereupon your orators bring this their bill, and thereupon your orators pray:

56 First: That this Honorable Court will grant an order temporarily restraining Thomas K. Campbell, Clyde B. Aitchison, and Oswald West, and each of them, and the said A. M. Crawford, as Attorney General, from attempting to enforce said order hereinbefore set out, and from taking any action, step, or proceeding against your orators, or either of them, or against any of the officers, agents, or employés of either of them, to enforce any penalties or remedies for any alleged violation by your orators or either thereof of the said order.

Second: That upon final hearing herein a decree be entered perpetually enjoining the said defendants and each of them, including their agents, officers, employees and attorneys, from attempting to enforce said order, or to prosecute any suits or actions against the complainants or either of them for pretended violation of said order, and that said order be set aside and held for naught, and that the said Railroad Commission Act be declared to be invalid and of no force and effect.

Third: That pending this suit, said order be suspended, and that upon final hearing, said order be set aside and held for naught, and the said Railroad Commission Act be adjudged to be void and of no force and effect.

Fourth: That your orators may have such other and further relief in the premises as the nature and circumstances of the case may require, and to the court may seem meet and equitable.

And may it please your Honor to grant unto your orators a writ of injunction conformable to the prayer of this bill, and also a writ of this Honorable Court to be directed to the said defendants, Thomas K. Campbell, Clyde B. Aitchison, Oswald West and A. M. Crawford, and each of them, commanding them and each of them, on a day

57 certain therein to be named, and under a certain penalty, to be and appear before your Honorable Court, and then and there full, true and perfect answers make to all and singular the premises (but not under oath, their and each of their answers under oath being expressly severally waived), and to stand and perform and abide such further orders, directions and decree therein as to your Honors shall seem meet and shall be agreeable to equity and good conscience.

And your orators will ever pray.

SOUTHERN PACIFIC COMPANY,
By J. P. O'BRIEN,
General Manager Lines in Oregon.
OREGON & CALIFORNIA RAILROAD
COMPANY,
By J. P. O'BRIEN, *Vice-President.*

BEN C. DEY,
JAMES E. FENTON AND
WM. D. FENTON,
Solicitors for Complainants.
WM. D. FENTON,
Of Counsel for Complainants.

STATE OF OREGON,
County of Multnomah, ss:

I, J. P. O'Brien, being first duly sworn depose and say: that I am General Manager of Southern Pacific Company, Lines in Oregon, and First Vice-President of the Oregon & California Railroad Company, complainants above named; that I have read the foregoing bill of complaint, know the contents thereof, and that the same is in all respects true of my own knowledge except as to the matters and things which are therein stated upon information and
58 belief, and as to those things, I believe the same to be true.

J. P. O'BRIEN.

Subscribed and sworn to before me this 12th day of October, 1910.

[SEAL.]

KENNETH L. FENTON,
Notary Public for Oregon.

DISTRICT OF OREGON,
County of Multnomah, ss:

Due service of the within Bill of Complaint is hereby accepted in said County, Oregon, this 12th day of October, 1910, by receiving a copy thereof, duly certified to as such by Wm. D. Fenton, solicitor and Attorney for complainants.

A. M. CRAWFORD AND
CLYDE B. ATTCHISON,
Attorneys for Defendants.

Bill of Complaint. Filed October 12, 1910. G. H. Marsh, Clerk.

59 And afterwards, to wit, on the 7th day of November, 1910, there was duly filed in said Court a *Præcipe* for appearance of defendants in words and figures as follows, to wit:

60 In the Circuit Court of the United States for the District of Oregon.

No. 3675. In Equity.

SOUTHERN PACIFIC COMPANY and OREGON AND CALIFORNIA RAILROAD COMPANY, Complainants,

vs.

THOMAS K. CAMPBELL, CLYDE B. AITCHISON, OSWALD WEST, Commissioners Constituting "Railroad Commission of Oregon," and A. M. Crawford, Attorney General of the State of Oregon, Defendants.

Præcipe for Appearance.

To the Clerk of said Court:

Please enter our appearance as solicitors for the defendants above named in the above entitled matter.

November 4th, 1910.

A. M. CRAWFORD,
CLYDE B. AITCHISON,

Solicitors for Defendants Above Named.

Præcipe for appearance. Filed November 7, 1910. G. H. Marsh, Clerk.

61 And afterwards, to wit, on the 3rd day of December, 1910, there was duly filed in said Court a Demurrer to the Bill of Complaint in words and figures as follows, to wit:

62 In the Circuit Court of the United States for the District of Oregon.

No. 3675.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Complainants,

vs.

THOMAS K. CAMPBELL, CLYDE B. AITCHISON, OSWALD WEST, Commissioners Constituting "Railroad Commission of Oregon," and A. M. Crawford, Attorney General of the State of Oregon, Defendants.

The Joint and Several Demurrers of Thomas K. Campbell, Clyde B. Aitchison, and Oswald West, Commissioners Constituting "Railroad Commission of Oregon," and A. M. Crawford, Attorney General of the State of Oregon, Defendants Above Named, to the Bill of Complaint of Complainants Above Named.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things, in the said complainant's bill

of complaint contained, to be true, in such manner and form as the same are therein set forth and alleged, do demur to said bill on the following grounds and each of them:

I.

That it appears upon the face of the bill herein that the court has no jurisdiction of the subject matter of the controversy between the parties.

63

II.

That it appears by the complainant's own showing by the said bill, that it is not entitled to the relief prayed by the said bill against these defendants, or any of the defendants.

III.

That said complainant has not in and by its said bill stated such a case as doth or ought to entitle it to the relief thereby sought and prayed for, from or against these defendants, or any of them.

IV.

That it appears upon the face of the bill that the complainant has an adequate remedy at law.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants demur thereto, and pray the judgment of this Honorable Court whether they shall be compelled to make any answer to said bill, and they humbly pray to be hence dismissed, with their reasonable costs in this behalf sustained.

C. B. AITCHISON,
A. M. CRAWFORD,

Solicitors and of Counsel for Defendants.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

A. M. CRAWFORD,
Of Counsel for Defendants.

Salem, Oregon, December 1st, 1910.

64 UNITED STATES OF AMERICA,
State of Oregon, County of Marion, ss:

Clyde B. Aitchison, being duly sworn, deposes and says: I am one of the above named defendants. The foregoing demurrer is not interposed for delay.

CLYDE B. AITCHISON.

Subscribed and sworn to before me this 1st day of December, 1910.

[SEAL.]

G. C. FRISBIE,
Notary Public for Oregon.

STATE OF OREGON,

County of Multnomah, ss:

Due service of the within demurrer is hereby accepted in Multnomah County, Oregon, this the 2nd day of December, 1910, by receiving a copy thereof, being certified as such by A. M. Crawford, of counsel for defendants.

WM. D. FENTON,

Solicitor and of Counsel for Complainants.

Demurrer. Filed Dec. 3, 1910. G. H. Marsh, Clerk.

65 And Afterwards, to wit, on the 3rd day of December, 1910, there was duly filed in said Court, a Demurrer to portions of the Bill of Complaint, in words and figures as follows, to wit:

66 In the Circuit Court of the United States for the District of Oregon.

No. 3675.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Complainants,

vs.

THOMAS K. CAMPBELL, CLYDE B. AITCHISON, OSWALD WEST, Commissioners Constituting "Railroad Commission of Oregon," and A. M. Crawford, Attorney General of the State of Oregon, Defendants.

The Joint and Several Demurrers of Thomas K. Campbell, Clyde B. Aitchison, and Oswald West, Commissioners Constituting "Railroad Commission of Oregon," and A. M. Crawford, Attorney General of the State of Oregon, Defendants Above Named, to Portions of the Bill of Complaint of Complainants Above Named.

These defendants appearing by protestation, not confession or acknowledging all or any of the matters and things in said complainants' bill of complaint, to be true, in such manner and form as the same are therein set forth and alleged, to demur as to so much and such part of the bill of complaint as is contained in paragraphs eight and nine thereof, and in each of said paragraphs, on the following grounds, and each of them:

I

That it appears from the facts set forth in said paragraph, and in each and all of them, that complainants are not entitled to the relief, or any part thereof, prayed for from or against these

67 defendants, or any of them.

II.

That the facts as set out in said paragraphs, and each of them, do not state a cause of suit, or any part of a cause of suit against these defendants, or any of said defendants.

And these defendants by protestation, not confessing or acknowledging any of the matters or things in said complainants' bill of complaint contained, to be true in such manner and form as therein set forth and alleged, do further demur to the matters and things set forth in various paragraphs of said bill of complaint, separately as to each paragraph, for the reasons and grounds hereinafter set forth, and for each of them.

Said defendants do demur separately to paragraph ten.

Said defendants do demur separately to paragraph eleven.

Said defendants do demur separately to paragraph twelve.

Said defendants do demur separately to paragraph thirteen.

Said defendants do demur separately to paragraph fourteen.

Said defendants do demur separately to paragraph fifteen.

Said defendants do demur separately to paragraph sixteen.

I.

That it appears from the facts set forth in said paragraphs, and in each and all of them, that complainants are not entitled to the relief, or any part thereof, prayed for from or against these defendants, or any of them.

II.

That the facts as set out in said paragraphs, and each of them, do not state a cause of suit, or any part of a cause of suit, against these defendants, or any of said defendants.

68 Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants demur thereto, and pray the judgment of this Honorable Court whether they shall be compelled to make any answer to said bill, and they humbly pray to be hence dismissed, with their reasonable costs in this behalf sustained.

C. B. AITCHISON,

A. M. CRAWFORD,

Solicitors, and of Counsel for Defendants.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

CLYDE B. AITCHISON,
Of Counsel for Defendants.

Salem, Oregon, December 1st, 1910.

UNITED STATES OF AMERICA,
State of Oregon, County of Marion, ss:

Clyde B. Aitchison, being duly sworn, deposes and says: I am one of the above named defendants. The foregoing demurrer is not interposed for delay.

CLYDE B. AITCHISON.

Subscribed and sworn to before me this 1st day of December, 1910.

[SEAL.]

G. C. FRISBIE,
Notary Public for Oregon.

STATE OF OREGON,
County of Multnomah, ss:

Due service of the within demurrer is hereby accepted in Multnomah County, Oregon, this the 2nd day of December, 1910, by receiving a copy thereof, being certified as such by A. M. Crawford, of counsel for defendants.

WM. D. FENTON,
Solicitor and of Counsel for Complainants.

Demurrer to portions of bill of complaint. Filed Dec. 8, 1910.
G. H. Marsh, Clerk.

69 And afterwards, to wit, on Monday, the 3rd day of July, 1911, the same being the 72nd judicial day of the Regular April, 1911, Term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

70 In the Circuit Court of the United States for the District of Oregon.

No. 3675.

SOUTHERN PACIFIC COMPANY
vs.
THOMAS K. CAMPBELL et al.

JULY 3, 1911.

This cause was heard upon the demurrer of the defendants to the Bill of Complaint herein, and was argued by Mr. William D. Fenton and Mr. James E. Fenton, of counsel for the plaintiff, and by Mr. Joseph N. Teal and Mr. Clyde B. Aitchison, of counsel for the defendants. On consideration whereof, it is ordered and adjudged that said demurrer be, and the same is hereby, sustained; and on motion of said plaintiff, it is ordered that it be, and it is hereby, allowed thirty days from this date within which to file an amended bill of complaint.

R. S. BEAN, *Judge.*

Order on demurrer to bill. Filed July 3, 1911. G. H. Marsh, Clerk.

71 And Afterwards, to wit, on the 3rd day of July, 1910, there was duly filed in said Court, an opinion, in words and figures as follows, to wit:

72 In the Circuit Court of the United States for the District of Oregon.

No. 3675.

SOUTHERN PACIFIC COMPANY, a Corporation, and OREGON & CALIFORNIA RAILROAD Co., a Corporation, Complainants,

vs.

THOS. K. CAMPBELL, CLYDE B. AITCHISON, FRANK J. MILLER, Commissioners Constituting "Railroad Commission of Oregon," and A. N. Crawford, Attorney General of the State of Oregon, Defendants.

W. D. Fenton, Jas. E. Fenton and Ben C. Dey, for Complainants.
J. N. Teal and Clyde B. Aitchison, for defense.

BEAN, *District Judge*:

This suit has been submitted on a demurrer to a bill to enjoin the enforcement of an order of the State Railroad Commission fixing certain class rates from Portland south over the lines for the Oregon & California Railroad Company, operated by the Southern Pacific Company, as lessee.

In September, 1910, the Commission upon due investigation and after a hearing by the complainant company, found that certain enumerated class rates on freight from Portland south to various stations in Oregon, then in force on complainant's lines were unjust, unreasonable and excessive, and unjustly discriminatory as against the several stations and localities and as between various classes of commodities, and by an order duly made and entered, fixed rates decided and found by it to be just, reasonable and non-discriminatory, in lieu thereof, expressly providing in the

73 order that it should not be construed to apply to interstate commerce. It is alleged that the rates fixed by the Commission, if enforced, will reduce the receipts of the complainant company, local and interstate, which for the year 1909, amounted to \$7,104,081.00 by the sum of \$276,931.80, but it is admitted by its counsel that this was an error in the footing and that the actual estimated reduction will be \$156,072.48 annually.

Without referring to the allegations of the complaint at length, the objections made to the order sought to be enjoined may be summarized as follows:

First. The act of the legislature creating the Railroad Commission is unconstitutional and void, because (a) of the excessive penalties and burdens imposed for refusal to obey the orders of the Commission; (b) because its provisions are not uniform and equal in their application; (c) because it confers upon the Commission legislative, executive and judicial powers; (d) because rate making is a legislative function and a rate cannot be made to take effect upon the order of a subordinate commission; (e) because it requires a railroad company aggrieved by an order of the Commission to proce-

cute any suit to review the same in the state courts; (f) because it provides for a judicial review of the orders of the Commission.

Second. The order in question is violative of the Constitution of the United States because it directly and materially affects interstate commerce, since the rate on interstate traffic over complainant's lines in Oregon is made up by the through rate to Portland with the local rate out.

Third. The law under which the Oregon & California Railroad Company was incorporated provides that a corporation organized thereunder "shall have power to collect and receive such tolls and freights for transportation of persons and property as it may
74 prescribe," and thus deprives the state of the power to fix rates for transportation of freight or passengers.

Fourth. The rates fixed by the Commission and sought to be enjoined in this suit are so unreasonably low as to amount to a confiscation pro tanto of complainant's property.

Fifth. The order of the Commission was based upon an arbitrary approval of Class One of rates then in force on complainant's line and an arbitrary spread between such class and other classes without any reference to the distance the traffic was to be carried, the character or nature, the service to be performed, or the compensation that should be paid therefor.

Seventh. That the rates prescribed by the Commission are unreasonable, and this court should review the same under the provisions of the Commission Act.

These several questions have been elaborately argued orally and by printed briefs. A large part of the discussion herein is directed to the constitutionality of the Railroad Commission Act, and the contention that the order sought to be enjoined directly and materially affects interstate commerce. Both of these questions were considered and decided by this court in the Campbell Case (O. R. N. vs. Campbell, 173 Fed. 957): The opinion of Judge Wolverton in that case contains such an exhaustive, satisfactory and full discussion of the subject as to leave nothing to be added. I fully concur in his views and am unable to distinguish this case in principle from the one decided by him. The averments in the bill that the order of the Commission interferes with interstate commerce is but the conclusion of the pleader, and is not in harmony with the facts alleged. Morrow, Circuit Judge, says:

75 "A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the railroad company for interstate traffic. Upon adjustment the latter rate must yield." (Woodside v. Tonopah & G. R. Co. 184 Fed. 360).

The next point is disposed of by this court and the State Supreme Court in *Ex Parte Koehler, Receiver*, 23 Fed. 529, and *State vs. S. P.* 23 Ore. 424.

The remaining points may be considered together. Rate making is a legislative function and when rates are fixed by the legislature or a subordinate body to which the power has been duly delegated,

they will not be declared invalid by the Federal Courts unless they are so unreasonably low that their enforcement would amount to the taking of property for public use without compensation and therefore practically a confiscation thereof. *Wilcox vs. Cons. Gas Co.* 212 U. S. 19. When it is shown that the prescribed rates will prevent the carrier from earning such compensation as under the circumstances is just, both to it and the public, their enforcement will be enjoined. (*Smith vs. Ames*, 169 U. S. 466.) But the rates now in controversy were made by the State Commission in the light of the knowledge of the facts, and after a thorough investigation and a hearing of the party interested. They are made by law *prima facie* lawful, and are therefore presumed to be reasonable, fair and just.

A. C. L. R. R. vs. Fla. ex rel.

Ellis, 203 U. S. 256.

Inter. Com. v. C. R. I. & P. R. R., 218 U. S. 88.

Ill. Cen. vs. Inter. Com. Com. 206 U. S. 441.

The burden is on the complainant to show by clear and satisfactory allegation and proof that, if enforced, they will necessarily be confiscatory. This court has no authority to fix rates, nor should it attempt to usurp the powers of the Commission upon its conception as to whether such powers have been wisely exercised or not. It can review the findings of the Commission only so far as to determine whether or not the rates promulgated by it will deprive the carrier of its property without just compensation.

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T. & P. R. R. v. Interstate Com., 162 U. S. 197.

Ex Parte Young, 209 U. S. 123.

San Diego L. & T. Co. v. Natl. City, 174 U. S. 739.

Knoxville v. K. Wtr. Co., 212 U. S. 1.

San Diego L. & T. Co. v. Jasper, 189 U. S. 439.

Interstate Com Com. v. Ill. Cen. 215 U. S. 452.

B. & O. vs. U. S. 215 U. S. 481.

Nor do I think its power, in this regard, is in any respect enlarged by the provisions of the state law for a review by the state courts of the acts of the Commission. Whether rates prescribed by legislative authority to be charged by public service corporations are unreasonably low, within the doctrine stated, involves a determination of the value of the property of the complainant devoted to the particular public use to which the rates apply, the measure of a reasonable return thereon, and whether the rates allowed to be charged are sufficient to that end. These questions are complex, intricate and often difficult of ascertainment; especially in the case of a carrier doing both local and interstate business. There is difficulty, in the first place, in determining the value of the property as a whole, whether it is to be taken as the market value of the stock and bonds, the original cost of construction with expenses of permanent improvements added, the cost of reproduction, the value of the property as a going concern, or whether all these matters are to be considered in fixing a fair value in a given case, and after the

entire value of the properties has been determined, how it shall be divided among the several states through which the road passes. It is substantially agreed that where a railroad is used in both local and interstate business, and the value of the property de-

77 voted to public use within a given state is ascertained, that it is fair to apportion such value among the different kinds and classes of business upon a revenue basis, but it is not always easy to ascertain the revenue from interstate traffic. The records of a company commonly show the gross revenue from local traffic wholly within the state, but much of the interstate business is often carried through the state, and in other instances the local haul within the state is only a small proportion of the entire haul and it is therefore difficult to determine what should properly and rightfully be allowed for interstate traffic. But even greater difficulty lies in the apportionment of the cost of the service, between local and interstate business, so as to determine whether the revenues from a particular class are sufficient to afford a fair return upon the value of the property devoted to such class. There are many items of cost, that disclose the class of business on account of which they are incurred, and can therefore be properly placed, but there is a large percentage of cost of doing all the business, like the maintenance of ways and structures, equipment, superintendence, operation of trains carrying both local and interstate traffic, which are incurred for the common benefit of both, and there is no definite rule by which these items of common cost can be divided between the different classes with mathematical accuracy. *M. K. & T. R. R. v. Love*, 177 Fed. 493.

These matters are not referred to because particularly material in the case in hand, nor with a design to approve or disapprove any particular rule or doctrine in reference thereto, but only to emphasize the position that a complainant seeking to enjoin rates fixed

by lawful authority should state facts and not conclusions,
78 facts which, if true, show that such rates will not or do not afford a fair return upon the value of the complainant's property devoted to the particular use. In the absence of such allegations, the presumption of law that the rates as made are fair, just and reasonable must prevail, and in my judgment the bill does not state facts sufficient to overcome this presumption. It is alleged in general terms that the local rates of the complainant company affected by the order of the Commission were reasonable and just and as low as the situation of the properties and the competitive condition of the business, both intrastate and interstate "will permit or allow, and the said compensation charged upon said existing tariffs is reasonable and just and affords to your orators but slight compensation above the cost of the service;" that the decreases attempted to be made by the Commission involve the class rates referred to and, if enforced, will deprive the complainant of a large sum of annual revenue and compel it to give the use of its property without reasonable or just compensation, and will compel it to increase other rates upon traffic not affected by the order, and particularly upon products of the soil, forest and farm, many of

which receive and enjoy terminal rates, including such commodities to be sold and consumed in the markets of the world, thereby compelling the complainant to discriminate against such last named products, to the great injury of the complainant and of the public; and that the order of the Commission is unreasonable, unjust and arbitrary, and, if enforced, will deprive the complainant of earnings which is entitled to collect and receive, in excess of the revenue that would be derived from the enforcement of the order; and "that said pretended order is void and of no force and effect in this:

79 that the rates sought to be prescribed by said order, in lieu of existing rates, are confiscatory of the property of your orators, and will deprive your orators of their property without compensation and without due process of law." These averments are not sufficient to raise an issue. (*Central of Ga. R. R. vs. McLendon*, 157 Fed. 961). They are but conclusions of law and are not supported by any averment of fact. Indeed they are inconsistent with the facts alleged. The bill states that the receipts from all sources, local and interstate, for the year 1909, were \$7,104,081.00, and the gross expenditures during the year \$5,839,698.00, leaving a net balance for the year of \$1,264,383.00. The value of the property, based upon the capital stock, bonded and floating indebtedness is put in the complaint at \$39,052,008. The bill is silent as to whether interest on the bonded and other indebtedness is included in the aggregate expenditures but since no segregation is made by complainant it is fair to assume that they include the operating expenses, interest and fixed charges, thus leaving a net balance of \$1,264,383, to be applied as dividends on complainant's stock of the par value of \$19,000,000.00. On this showing, it certainly cannot be consistently said that the earnings of the complainant, even after making the deductions alleged to be caused by the order complained of "will afford but slight compensation above the cost of service," or that the order of the Commission is confiscatory, or, in advance of actual experience, that the rates fixed by the Commission will not afford a fair return upon the value of the property.

Again the complainant does not state the amount of intra-state traffic which will be affected by the order, nor the cost of service, nor the value of the property devoted to such business. It sets out the value of the entire property, the gross receipts and disbursements for both state and interstate business for a number of years prior to the date of the order, the amounts received from state and interstate business, freight and passenger, during the year 1909, and approximate percentage of tonnage affected by the order sought to be enjoined, assuming, as I take it, that both local and interstate traffic are affected by such order. There is no allegation as to the cost of conducting state business as distinguished from interstate business, and no statement of the difference between passenger and freight expenses.

The demurrer should be sustained and it is so ordered.

Opinion. Filed July 3, 1911. G. H. Marsh, Clerk.

81 And afterwards, to wit, on Tuesday, the 18th day of July, 1911, the same being the 84th judicial day of the regular April, 1911, term of said court. Present: The Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

82 In the Circuit Court of the United States for the District of Oregon.

In Equity. No. 3675.

SOUTHERN PACIFIC COMPANY and OREGON AND CALIFORNIA RAILROAD COMPANY, Complainants,

vs.

THOMAS K. CAMPBELL, FRANK J. MILLER and CLYDE B. AITCHISON, Constituting the Railroad Commission of Oregon, and A. M. Crawford, Attorney General of the State of Oregon, Defendants.

This cause came on for hearing upon the demurrer of defendants to complainants' bill of complaint, and was duly argued by counsel for complainants and defendants, and taken under advisement by the Court, and thereafter, and on July 3rd, the court rendered its opinion sustaining said demurrer and on the same day counsel for complainants caused to be entered an order granting to said complainants a period of thirty days in which to further plead, and thereafter, and on the 18th day of July, W. D. Fenton, counsel for complainants, appeared in open court, and stated that complainants did not desire to further plead in said cause.

Now, therefore, it is hereby considered, ordered, adjudged and determined that the demurrer of said defendants to said bill of complaint be, and the same is, hereby sustained, and the said 83 complaint is hereby dismissed.

And it is further ordered that the defendants have, and recover, of and from complainants their costs and disbursements herein, taxed in the sum of — Dollars.

Dated this 18th day of July, 1911.

R. S. BEAN, *Judge.*

Service of the within judgment order and receipt of a copy is hereby admitted this 18th day of July, 1911.

WM. D. FENTON,
Of Solicitors for Complainants.

Judgment. Filed July 18, 1911. G. H. Marsh, Clerk. By J. W. Marsh, Deputy.

84 And afterwards, to wit, on the 28th day of July, 1911, there was duly filed in said court, a Petition for Appeal in words and figures as follows, to wit:

85 In the Circuit Court of the United States for the District of Oregon.

No. 3675.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Plaintiffs,

vs.

THOMAS K. CAMPBELL, CLYDE B. AITCHISON, FRANK J. MILLER, Commissioners Constituting "Railroad Commission of Oregon," and A. M. Crawford, Attorney General of the State of Oregon, Defendants.

The above named plaintiffs conceiving themselves aggrieved by the decree made and entered in the above entitled court on the 18th day of July, 1911, in the above entitled cause, do hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors which is filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States; that the judge of the above entitled court may be pleased to fix the amount of the bond for said plaintiffs, for costs and damages on appeal, and approve said bond.

WM. D. FENTON,

BEN C. DEY,

JAMES E. FENTON AND

KENNETH L. FENTON,

*Solicitors for Southern Pacific Co. and
Oregon & California R. R. Co.*

86 DISTRICT OF OREGON,
County of Multnomah, ss:

Due service of the within petition for appeal is hereby accepted and admitted to have been made upon defendants and upon us in Multnomah County, Oregon, this 25th day of July, 1911, by receiving a copy thereof, duly certified to as such by Wm. D. Fenton, of attorneys for plaintiffs.

JOSEPH N. TEAL,
Of Attorney for Defendants.

Petition for Appeal. Filed July 28, 1911. G. H. Marsh, Clerk

87 And afterwards, to wit, on the 28th day of July, 1911, there was duly filed in said court, an Assignment of Errors in words and figures as follows, to wit:

88 In the Circuit Court of the United States for the District of Oregon.

No. 3675.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Plaintiffs,

vs.

THOMAS K. CAMPBELL, CLYDE B. AITCHISON, FRANK J. MILLER, Commissioners Constituting "Railroad Commission of Oregon," and A. M. Crawford, Attorney General of the State of Oregon, Defendants.

Assignment of Errors.

The plaintiffs, Southern Pacific Company, and Oregon & California Railroad Company, pray an appeal from the final decree of this court heretofore on the 18th day of July, 1911, entered herein, to the Supreme Court of the United States, and assign for error:

I.

That said Circuit Court erred in sustaining the demurrers and each thereof of the defendants to the bill of complaint herein.

II.

That said Circuit Court erred in dismissing said cause and said bill of complaint.

III.

That said Circuit Court erred in deciding that plaintiffs are not entitled to the relief prayed for in their bill of complaint, or to any relief whatever in said cause.

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IV.

That said Circuit Court erred in refusing to grant to plaintiffs the relief prayed for in their bill of complaint herein.

V.

That said pretended order of September 21, 1910, of the Railroad Commission of Oregon, is void and of no force and effect in this:

(a) That thereby the shippers and other persons who may avail themselves of the said class rates so attempted to be ordered into effect, will take the property of plaintiffs for private use without just or any compensation, and without the consent of plaintiffs, in violation of Section 18, of Article I of the Constitution of Oregon, which provides that private property shall not be taken for public use, nor the particular services of any man be demanded without just compensation, nor, except in case of the state, without such compensation assessed and tendered.

That said order of said Railroad Commission is unreasonable, unjust and arbitrary, and particularly in this: that if the same is enforced, it will deprive the Southern Pacific Company of earnings to the amount of \$156,072.48 annually, which it is entitled to collect and receive in excess of the revenues that would be derived from the enforcement of said order, so as to enable plaintiffs to receive a just and fair return upon the property of plaintiffs.

(b) Said Railroad Commission Act is void and of no force and effect in this: that it is an attempt to give to said defendants Campbell, Aitchison, and Miller, collectively known as "Railroad Commission of Oregon," jurisdiction, power and authority to exercise legislative, executive and judicial powers, contrary to and in violation of said Section 1, of Article III of the Constitution of the State of Oregon, which provides that: "The powers of the government shall be divided into three separable departments,—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duty under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

(c) Said Railroad Commission of Oregon, in passing upon said class rates upon its own initiative, and hearing the testimony of shippers, and in taking said testimony in relation thereto, attempted to and did exercise judicial functions; and in making said order, exercised legislative and judicial functions; both and each in violation of said Section 1, Article III, as aforesaid.

(d) Said Railroad Commission Act is void and of no force and effect in this: that it violates Section 21, Article I, of the Constitution of the State of Oregon, which provides that: "No ex post facto law, or law impairing the obligations of contracts, shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution; Provided, that laws locating the capital of the state * * * may take effect or not, upon a vote of the electors interested."

(e) Said Railroad Commission Act is void and of no force and effect in this: that it violates Section 21, Article I, of said Constitution of Oregon, in this: that it is expressly provided that the said Railroad Commission of Oregon shall have and exercise authority which, when exercised, shall take effect upon their orders, and not by virtue of any law passed by the Legislative Assembly of the state.

(f) Said Railroad Commission Act is void and violative of the Constitution of the State of Oregon in this: that it violates Section 1, Article VII, which provides that: "The judicial power of the state shall be vested in a Supreme Court, Circuit Courts, and County

Court, which shall be courts of record, having general jurisdiction, to be defined, limited and regulated by law, in accordance with this Constitution," and particularly in this, that the said Act undertakes to deprive the complainants and all other persons of their right to contest in the courts of the state, authorized by said Section 1, Article VII, or of any court other than the Circuit Court of the State of Oregon, for Marion County; and that the said Act

a denial to complainants and other persons of the equal protection of the laws, and deprives the complainants and other citizens of other states of the right to litigate their cause of suit in the courts of the United States, and as such is violative of the Fourteenth Amendment to the Constitution of the United States, which, among other things, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

That the said order of the said commission so attempted to be made on September 21, 1910, is void and of no force and effect, in this: that if enforced it will deprive plaintiffs of their property without due process of law, and will prevent plaintiffs from receiving a just or any return upon their properties sufficient to enable plaintiff, the Oregon & California Railroad Company, to pay its stockholders any returns or dividends upon any of its capital stock whatsoever.

(g) Said Railroad Commission Act is void and of no force and effect in this: that it violates Article I, Section 8, Paragraph 3 of the Constitution of the United States, which provides: "Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and is violative of Article I, Section 18, of the Constitution of the United States, which provides: "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof," and particularly in this: that the said act of the Legislative Assembly of the State of Oregon attempts to confer upon the Railroad Commission of Oregon jurisdiction over interstate commerce, and does not limit its power and authority to commerce wholly within the State of Oregon; and particularly, further, in this, that the said Railroad Commission Act necessarily attempts to and does confer upon the said Railroad Commission authority and power to take into consideration, in determining and fixing any rate for the carriage of freight or passengers upon the lines of plaintiffs within the State of Oregon, the earnings of the said plaintiffs derived from interstate traffic.

(h) Said order so attempted to be made as aforesaid, on September 21, 1910, is void and of no force and effect in this: that said order, if enforced, would violate Article I, Section 8, Paragraph 3, of the Constitution of the United States, and would violate Article I, Section 18, of the Constitution of the United States, hereinbefore set out, and would be in conflict with the Act of February 4, 1887, entitled, "An Act to regulate Commerce," and the amendments thereto, and particularly the "Act to regulate commerce," as amended June 18, 1910, in this, that the said order directly, materially, and

substantially affects the rates upon practically all the interstate shipments of plaintiffs.

(i) Said Railroad Commission Act is void and of no force and effect in this: that it provides for excessive, unusual penalties, 93 fines and punishments, and thereby deprives the plaintiffs and other common carriers and other citizens of the United States of the equal protection of the laws, and thereby takes property of the plaintiffs without due process of law.

(j) Said Railroad Commission Act, and the said pretended order of September 21, 1910, and each thereof, is void and of no force and effect in this: that the same is violative of Section 10, of Article I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, and particularly in this, that the said Railroad Commission Act and the said pretended order are and each of them is violative of the contract rights of plaintiffs under the Articles of Incorporation of the Oregon & California Railroad Company and its predecessors in interest, and under the Constitution and laws of the State of Oregon, and particularly under Section 2, Article XI of the Constitution of the State of Oregon, and Section 36 of Chapter 7, of the Miscellaneous Laws of the State of Oregon, being Section 34 of the Act of the Legislative Assembly, approved October 14, 1862, providing for private corporations and the appropriation of private property therefor, hereinbefore specifically set out.

(k) Said order is void and of no force and effect in this: that the pretended reduction of said class rates is based upon the arbitrary approval of Class 1, now in effect by plaintiff, Southern Pacific Company, and an arbitrary spread between said class rates, adopting the arbitraries of 100 per cent for first class, 85 per cent of first class for second class, 70 per cent of first class for third class, 60 per cent of first class for fourth class, 50 per cent of first class for fifth class, 50 per cent of first class for Class A, 40 per cent of first class for Class B, 30 per cent of first class for Class C, 25 per cent of first class for Class D, and 20 per cent of first class for Class E.

94 which said arbitrary classification and spread, and each thereof, was adopted by the said Railroad Commission in making said pretended order, and was so adopted arbitrarily and without any reference to the distance such traffic should be moved, or the character or nature of the traffic, or the service to be performed, or the compensation that should be paid therefor, and said classification is capricious and not based upon any fair consideration.

Plaintiffs further show that under said arbitrary spread or the application of said percentage to said class rates, the largest reduction is effective at points on said lines more difficult and expensive to operate by reason of mountain chains and physical difficulties.

Said pretended order is void and of no force and effect in this: that the rates sought to be prescribed by said order, in lieu of existing rates, are confiscatory of the property of plaintiffs, and will deprive plaintiffs of their property without compensation, and without due process of law.

Wherefore Plaintiffs pray that the decree of the said Circuit Court

be reversed, and that upon final hearing the plaintiffs have a decree as prayed for in their bill of complaint.

WM. D. FENTON,
BEN C. DEY,
JAMES E. FENTON, AND
KENNETH L. FENTON,
Solicitors for Plaintiffs.

DISTRICT OF OREGON,
County of Multnomah, ss:

Due service of the within Assignment of Errors is hereby accepted and admitted to have been made in Multnomah County, Oregon, this 25th day of July, 1911, upon defendants and upon us, by receiving a copy thereof, duly certified to as such by Wm. D. Fenton, of Attorneys for plaintiffs.

JOSEPH N. TEAL.
Of Attorneys for Defendants.

Assignment of Errors. Filed July 28, 1911. G. H. Marsh, Clerk.

95 And afterwards, to wit, on Friday, the 28th day of July, 1911, the same being the 93rd judicial day of the regular April 1911, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

96 In the Circuit Court of the United States for the District of Oregon.

No. 3675.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Plaintiffs,

vs.

THOMAS K. CAMPBELL, CLYDE B. AITCHISON, FRANK J. MILLER, Commissioners Constituting "Railroad Commission of Oregon," and A. M. Crawford, Attorney General of the State of Oregon, Defendants.

Order.

It appearing to the court that plaintiffs have filed herein their Assignment of Errors and their petition praying that an appeal may be allowed to the Supreme Court of the United States from the decree made and entered in said court in said cause on the 18th day of July, 1911, and that the judge of the above entitled court may be pleased to fix the amount of the bond for said plaintiffs, for costs and damages, and approve said bond.

It is ordered that the appeal of plaintiffs, Southern Pacific Company, and Oregon & California Railroad Company, to the Supreme

Court of the United States, from the decree made and entered in this court in this cause on the 18th day of July, 1911, be and the same is hereby allowed, and that said plaintiffs give their bond to the defendants for costs and damages on said appeal, with a surety to be approved by this court, for the sum of \$1,000, which shall operate as a supersedeas bond.

R. S. BEAN Judge.

Dated at Portland, in the District of Oregon, this 28th day of July, A. D., 1911.

97 DISTRICT OF OREGON,
County of Multnomah, ss:

Due service of the within order is hereby accepted and admitted to have been made upon Defendants and upon us in Multnomah County, Oregon, this 27th day of July, 1911, by receiving a copy thereof duly certified to as such by Wm. D. Fenton of Attorneys for Complainants.

J. N. TEAL,
Of Attorneys for Defendants.

Order. Filed July 28, 1911. G. H. Marsh, Clerk.

98 And afterwards, to wit, on the 28th day of July, 1911, there was duly filed in said Court a Bond on Appeal in words and figures as follows to wit:

99 In the Circuit Court of the United States for the District of Oregon.

No. 3675.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Plaintiffs,

VS.

THOMAS K. CAMPBELL, CLYDE B. AITCHISON, FRANK J. MILLER, Commissioners Constituting "Railroad Commission of Oregon," and A. M. Crawford, Attorney General of the State of Oregon, Defendants.

Bond.

Know all men by these presents, that we, Southern Pacific Company, a corporation organized under the laws of the State of Kentucky, and Oregon & California Railroad Company, a corporation organized under the laws of the State of Oregon, as principals, and M. J. Buckley as surety, are held and firmly bound unto the defendants above named in the full and just sum of One Thousand Dollars, to be paid to the said defendants, their successors or assigns, to which payment well and truly to be made Southern Pacific Company and Oregon & California Railroad Company, each for itself and its

cessors and assigns, and said M. J. Buckley for himself and his heirs, executors and administrators, bind themselves jointly and severally by these presents.

Whereas the above named plaintiffs, Southern Pacific Company and Oregon & California Railroad Company, have prosecuted an appeal to the United States Supreme Court, to reverse the decree in the above entitled cause made by the Circuit Court of the United States for the District of Oregon, on the 18th day of July, 1911, and said appeal has been allowed by said court,

Now therefore, the condition of this obligation is such, that if the above named plaintiffs shall prosecute such appeal to effect and answer all damages and costs if they fail to make such appeal good, then this obligation to be void, otherwise to remain in full force and virtue.

In witness whereof said Southern Pacific Company has caused these presents to be signed by its General Manager, Lines in Oregon, he being thereunto duly authorized, and by said Oregon & California Railroad Company, by its Secretary and Second Vice-President, they being thereunto duly authorized; and said M. J. Buckley has hereunto set his hand and seal both on this 26th day of July, A. D. 1911.

SOUTHERN PACIFIC COMPANY,

By J. P. O'BRIEN,

General Manager Lines in Oregon.

OREGON & CALIFORNIA RAILROAD
COMPANY,

By J. P. O'BRIEN, *Vice-President.*

[SEAL.]

OREGON & CALIFORNIA RAILROAD
COMPANY,

By W. W. COTTON, *Secretary.*

M. J. BUCKLEY, *Surety.*

[SEAL.]

In the presence of:

N. C. SOULÉ.

JOHN P. HANNON.

101 DISTRICT OF OREGON,

County of Multnomah, ss:

I, M. J. Buckley whose name is subscribed as surety to the within bond, being duly sworn, say: that I am a resident and householder within the State of Oregon; that I am not a counsellor or attorney at law, sheriff, clerk or other officer of any court and am worth the sum of \$2,000 over and above all my just debts and liabilities, exclusive of property exempt from execution.

M. J. BUCKLEY.

Subscribed and sworn to before me this 26th day of July, 1911.

[SEAL.]

KENNETH L. FENTON,

Notary Public for Oregon.

Approved by

R. S. BEAN, *Judge.*

DISTRICT OF OREGON,
County of Multnomah, ss:

Due service of the within bond on appeal is hereby acknowledged and admitted to have been made upon defendants and upon us in Multnomah County, Oregon, this 27th day of July, 1911, by recording a copy thereof, duly certified to as such by Wm. D. Funnell, Attorneys for Plaintiffs.

J. N. TEAL,
Of Attorneys for Defendants.

Bond on appeal. Filed July 28, 1911. G. H. Marsh, Clerk.

102 UNITED STATES OF AMERICA,
District of Oregon, ss:

I, G. H. Marsh, Clerk of the Circuit Court of the United States for the District of Oregon, pursuant to the foregoing order allowing the appeal of the Southern Pacific Company and Oregon and California Railroad Company from the final decree of said Court entered in the case of the Southern Pacific Company and Oregon and California Railroad Company, against Thomas K. Campbell, Clyde Aitchison, Frank J. Miller, Commissioners constituting "Railroad Commission of Oregon," and A. M. Crawford, Attorney General of the State of Oregon, No. 3675, do hereby certify that the foregoing pages numbered from two to 101, inclusive contain a true and complete transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office in my custody.

In Testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 5th day of August, A. D. 1911.

[Seal United States Circuit Court, Oregon.]

G. H. MARSH, Clerk.

Endorsed on cover: File No. 22,860. Oregon C. C. U. Term No. 784. Southern Pacific Company and Oregon & California Railroad Company, appellants, vs. Thomas K. Campbell, Clyde Aitchison, and Frank J. Miller, Commissioners Constituting "Railroad Commission of Oregon," and A. M. Crawford, Attorney General of the State of Oregon. Filed September 20, 1911. File No. 22,860.

COPY BOUND CLOSE IN CENTER

Supreme Court of the United States,

OCTOBER TERM, 1911.

No. 784.

SOUTHERN PACIFIC COMPANY
and OREGON & CALIFORNIA
RAILROAD COMPANY,
Appellants,

AGAINST

THOMAS K. CAMPBELL, ET AL.,
constituting Railroad Com-
mission of Oregon, and A. M.
CRAWFORD, Attorney Gen-
eral of the State of Oregon,
Appellees.

APPEAL FROM UNITED STATES CIRCUIT COURT
FOR THE DISTRICT OF OREGON.

Motion to Advance.

TO THE HONORABLE THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES :

The Southern Pacific Company and the Ore-
gon & California Railroad Company, appellants

herein, respectfully move the Court to advance the above entitled cause to be heard on October 10, 1911, with Simpson *et al.* v. Shepard, No. 599, Simpson *et al.* v. Kennedy, No. 600, and Simpson *et al.* v. Shillaber, No. 601, and The Oregon Railroad and Navigation Company v. Campbell *et al.*, No. 424, for the following reasons :

Nos. 599, 600 and 601 are appeals by the Minnesota State Railroad and Warehouse Commission from decrees of the United States Circuit Court for the District of Minnesota holding that certain rates for railroad transportation within the State of Minnesota prescribed by State statute and by orders of the said Commission are unconstitutional and void because by their natural and necessary effect they substantially burden and directly regulate interstate commerce. No. 424 is an appeal from a decree of the United States Circuit Court for the District of Oregon dismissing a bill filed to enjoin the enforcement of certain rates established by the Railroad Commission of the State of Oregon because of their necessary interference with interstate commerce.

This cause is a suit by the Oregon & California Railroad Company, the owner of a rail-

road in Oregon, and Southern Pacific Company, which operates said road, as lessee, as a part of an extensive system of railroads in various States, against the Railroad Commissioners and Attorney General of Oregon to enjoin the enforcement of certain rates prescribed by the Railroad Commission for transportation within the State of Oregon, being reductions of the rates previously maintained. The bill was dismissed upon demurrer.

The Southern Pacific Company published a tariff naming local rates between Portland, Oregon, and other points on its lines in Oregon. These rates have been reduced by the order of the Oregon Railroad Commission against which this suit is directed.

The rates named in said local tariff, although applying between points all in Oregon, are used as basing rates on interstate traffic originating outside of Oregon destined to points in Oregon on the Southern Pacific Company's line, and said local tariff is filed with the Interstate Commerce Commission.

With a single exception, all traffic subject to application of class rates originating in California south of Marysville and in every other State of the United States destined to points on the Southern Pacific Company's line in Oregon is

transported at through rates obtained by adding to the rate applying to Portland, which is determined by ocean competition, the local rate from Portland to the point of destination in Oregon on the Southern Pacific Company's line. The Southern Pacific Company publishes tariffs covering interstate commerce naming through rates from a large number of shipping points in the state of California to all points in Oregon on its line, which rates are made up by using the ocean competitive rate from San Francisco and other Bay points, to Portland, and adding thereto the local class rates from Portland to points on the line of Southern Pacific Company in Oregon. Through interstate rates from eastern shipping points to points in Oregon south of Portland on the Southern Pacific Company's line are made under tariffs published by carriers participating in transcontinental traffic by adding to the rate to Portland, as the nearest Pacific Coast terminal, the local rate from Portland to destination named in the Southern Pacific Company's said local tariff filed with the Interstate Commerce Commission.

It is alleged in the bill of complaint that the order of the Railroad Commission and the reduction of local rates attempted to be made thereby

would immediately, directly and materially affect, change and alter rates on interstate shipments, and would reduce said interstate rates to the extent of the said attempted reduction of the local rates specified in said order, and that it would materially and directly affect all interstate freight traffic of the Southern Pacific Company and other common carriers moving traffic to Portland, and to other points on the line of Southern Pacific Company in Oregon. By way of illustration the bill shows that the through rate on syrup in car loads from New York to Eugene, Oregon, under the Transcontinental Freight Bureau West Bound Tariff was the rate from point of origin to Portland, namely, 85 cents per hundred pounds, plus the local rate from Portland to Eugene, namely, 33 cents per hundred pounds, making a through rate of \$1.18; and that the effect of the order of the Oregon Railroad Commission reducing the local rates between Portland and other points in Oregon on the Southern Pacific Company lines would be to reduce the through interstate rate on syrup from New York to Eugene for car loads to \$1.08. On less than car loads a similar reduction from \$1.61 to \$1.53 would result. Other illustrations of the effect of the order upon interstate commerce are set forth in the bill.

The bill charges that the order of the Railroad Commission is void in that it directly, materially and substantially affects the rates upon practically all the interstate shipments of the appellants, and thereby regulates interstate commerce in violation of Article 1 Section 8 of the Constitution of the United States conferring upon Congress the exclusive power over interstate commerce.

The question presented in this cause is the right of the State or its representatives to prescribe rates upon intrastate transportation when such intrastate rates naturally and necessarily effect the rates upon interstate commerce to and from that State. The question is identical with that presented in the Minnesota rate cases and in the case of The Oregon Railroad and Navigation Company against the Railroad Commission and Attorney General of Oregon. This question is of the gravest public importance not alone to the State of Oregon and the common carriers immediately affected, but to the public of every State and to every common carrier within the United States. The convenience of the Court and of the parties and the interests of the public generally will be subserved by the advancement of this cause to be heard at the

same time with the other cases hereinbefore
named involving the same question.

Dated September 25, 1911.

Respectfully submitted,

MAXWELL EVARTS,

WILLIAM D. FENTON,

Of counsel for Appellants.

Notice of Motion.

PLEASE TAKE NOTICE that the foregoing motion to advance will be submitted to the Supreme Court of the United States on Monday, October 9th, 1911, at the opening of the Court on that day or as soon thereafter as counsel can be heard.

Dated September 25, 1911.

MAXWELL EVARTS,

WILLIAM D. FENTON,

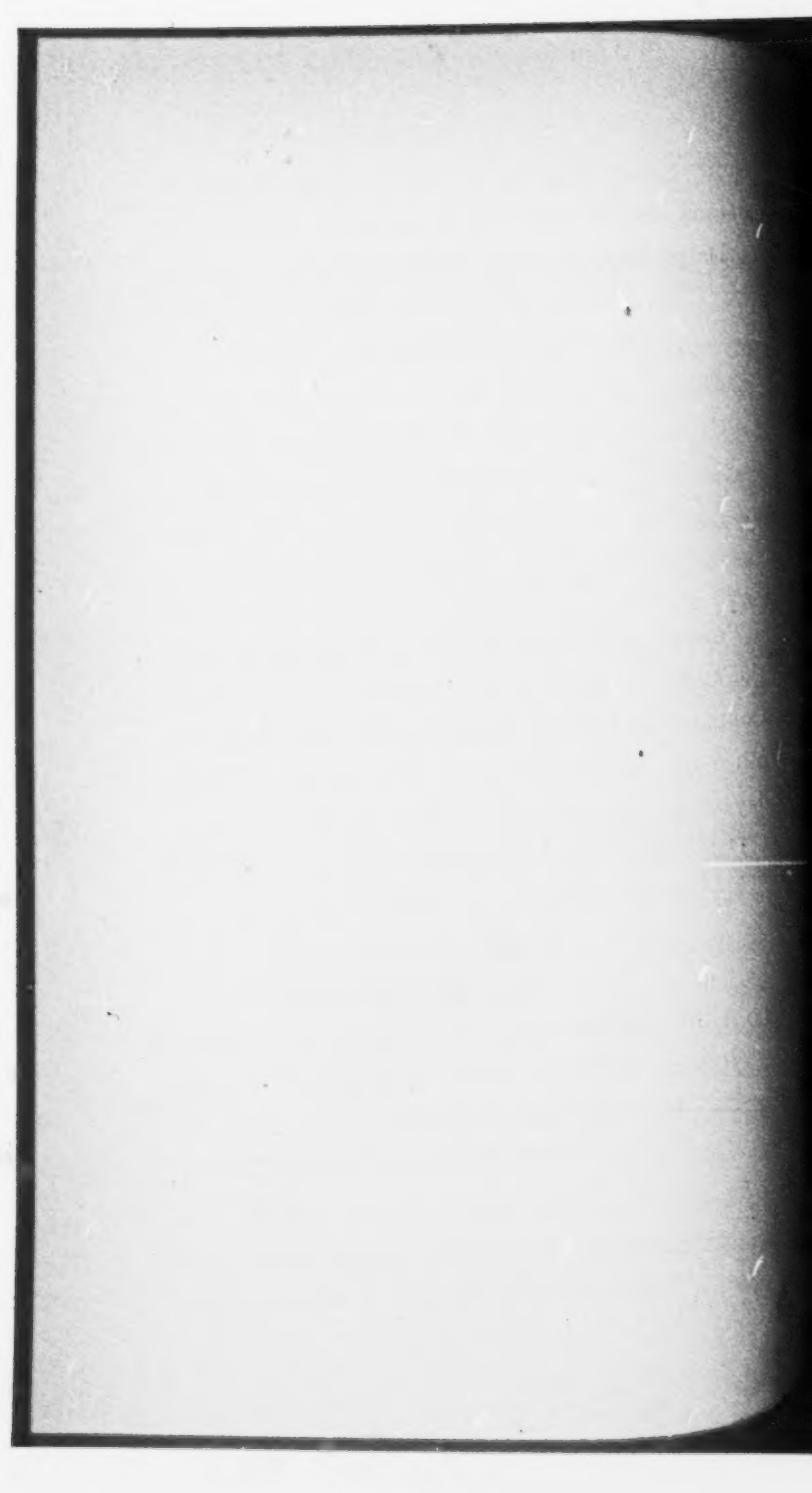
Of counsel for Appellants.

To A. M. CRAWFORD,

JOSEPH N. TEAL,

CLYDE B. AITCHISON, ESQRS.,

Counsel for Appellees.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

No. 784

SOUTHERN PACIFIC COMPANY
and OREGON & CALIFORNIA
RAILROAD COMPANY,

Appellants,

AGAINST

THOMAS K. CAMPBELL ET AL.,
constituting Railroad Com-
mission of Oregon, and A. M.
CRAWFORD, Attorney Gen-
eral of the State of Oregon,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR
THE DISTRICT OF OREGON.

RESISTANCE TO MOTION TO ADVANCE.

*To the Honorable the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Come now Thomas K. Campbell, Clyde B. Aitchison and
Frank J. Miller, constituting Railroad Commission of
Oregon, and A. M. Crawford, Attorney General of the
State of Oregon, appellees herein, and respectfully oppose
the motion made by the appellants to advance the above
entitled cause to be heard on October 10, 1911, with

Simpson *et al.* v. Shepard, No. 599, Simpson *et al.* v. Kennedy, No. 600, and Simpson *et al.* v. Shillaber, No. 601, and The Oregon Railroad and Navigation Company v. Campbell *et al.*, No. 424, for the following reasons:

1. That if the motion to advance is sustained and this cause is consolidated with those set for hearing upon October 10, 1911, there will not be sufficient time for the printing of the record and for the preparation and printing of brief and argument on behalf of these appellees.

2. That the issues in this cause, while embracing some of the issues in The Oregon Railroad and Navigation Company v. Campbell, *et al.*, No. 424, embrace other and important constitutional questions.

3. That Maxwell Evarts, Esq., who is of counsel for appellants in this cause is, as appellees herein are informed, also of counsel for appellants in No. 424, The Oregon Railroad and Navigation Company v. Campbell, *et al.*, and will have full opportunity to be heard in opposition to these appellees upon the question of the interference with interstate commerce suggested by the motion to advance, when cause No. 424 is presented. The members of Railroad Commission and Attorney General, appellees herein, are also appellees in cause No. 424.

The objections raised by the bill of complaint to the order of the Railroad Commission sought to be enjoined were summarized as follows by the court below in its opinion:

"First.—The act of the legislature creating the Railroad Commission is unconstitutional and void, because (a) of the excessive penalties and burdens imposed for refusal to obey the orders of the Commission; (b) because its provisions are not uniform and equal in their application; (c) because it confers upon the Commission legislative, executive, and judicial powers; (d) because rate making is a legislative function and a rate cannot be made to take effect upon the order of a subordinate com-

mission; (e) because it requires a railroad company aggrieved by an order of the Commission to prosecute any suit to review the same in the State courts; (f) because it provides for a judicial review of the orders of the Commission.

"*Second.*—The order in question is violative of the Constitution of the United States because it directly and materially affects interstate commerce, since the rate on interstate traffic over complainant's lines in Oregon is made up by the through rate to Portland with the local rate out.

"*Third.*—The law under which the Oregon & California Railroad Company was incorporated provides that a corporation organized thereunder 'shall have power to collect and receive such tolls and freights for transportation of persons and property as it may prescribe,' and thus deprives the State of the power to fix rates for transportation of freight or passengers.

"*Fourth.*—The rates fixed by the Commission and sought to be enjoined in this suit are so unreasonably low as to amount to a confiscation *pro tanto* of complainant's property.

"*Fifth.*—The order of the Commission was based upon an arbitrary approval of Class One of rates then in force on complainant's line and an arbitrary spread between such class and other classes without any reference to the distance the traffic was to be carried, the character or nature of the service to be performed, or the compensation that should be paid therefor.

"*Seventh* [Error: should be Sixth].—That the rates prescribed by the Commission are unreasonable, and this Court should review the same under the provisions of the Commission Act."

All of the points above summarized have been preserved by appellants in their assignment of error.

It will be observed that the motion to advance does not refer to any of the issues above summarized except the second. An examination of the record in cause No. 421 will disclose that the objections to the order summarized above as third, fourth, fifth and seventh are peculiar to this case. Appellees are desirous of being heard fully thereon. The notice to advance is, according to notice served upon appellees, to be heard on Monday, October 9, 1911, at the opening of Court on that day, or as soon thereafter as counsel can be heard. The prayer of the motion is that the cause be set down for argument on the following day, October 10. Between October 9 and October 10 is insufficient time for the printing of the record and the preparation and printing of briefs.

These appellees do not object to an order advancing the above entitled cause upon the docket, provided a reasonable time is given for the printing of the record and for these appellees properly to prepare and file their brief and argument upon questions not involved in the case set for argument October 10, 1911.

A. M. CRAWFORD,

Attorney General of the State of Oregon.

CLYDE B. AITCHISON,

Of Counsel for Appellees.

In the Supreme Court of the United States

OCTOBER TERM 1911.

No. 784.

**SOUTHERN PACIFIC COMPANY
AND OREGON & CALIFORNIA
RAILROAD COMPANY,
Appellants,**

vs.

**THOMAS K. CAMPBELL, CLYDE
B. AITCHISON and FRANK J.
MILLER, Commissioners con-
stituting "Railroad Commis-
sion of Oregon," and A. M.
CRAWFORD, Attorney General
of the State of Oregon.**

**APPEAL FROM THE CIRCUIT COURT OF THE
UNITED STATES FOR THE DISTRICT OF
OREGON.**

BRIEF FOR APPELLANTS.

Statement.

This is an appeal from the decree of the Circuit Court of the United States for the District

of Oregon, entered July 18, 1911, sustaining the demurrers of the defendants to the bill of complaint, and dismissing the cause and complaint.

On October 12, 1910, the appellants filed their bill of complaint in the Circuit Court of the United States for the District of Oregon, against the defendants and respondents, to set aside an order of the Railroad Commission of Oregon made September 21, 1910, and served upon Southern Pacific Company on September 23, 1910, by which the Railroad Commission attempted to find that class rates on the Southern Pacific Company's lines from Portland to all points on its lines in Oregon, are unjust, unreasonable, and excessive; and by which the Railroad Commission attempted to find that said class rates were unjustly discriminatory as against the several stations and localities mentioned; and as between the various classes of commodities taking class rates; and by which the Railroad Commission ordered Southern Pacific Company to cease and desist imposing and collecting such alleged unjust, unreasonable, and excessive class rates, and in lieu thereof required Southern Pacific Company in the future to charge, collect and impose certain specified rates set out in the order, and to make the necessary changes in its tariffs

within twenty days from the date of service of such order. The suit is also to enjoin the defendants. The prayer of the bill is that the defendants be enjoined from taking any action, step, or proceeding to enforce any penalties or remedies for violation of this order, and that pending suit the order be suspended; that upon final hearing such order be set aside and held for naught, and the Railroad Commission Act be adjudged to be void and of no force and effect; and that a decree should be entered perpetually enjoining the defendants from attempting to enforce such order or to prosecute any suit or action against the complainant for pretended violation of said order. (Record, pages 2-48.)

To the bill of complaint the defendants filed their joint and several demurrers. The grounds of the general demurrer are as follows:

I.

That it appears upon the face of the bill herein that the court has no jurisdiction of the subject matter of the controversy between the parties.

II.

That it appears by the complainant's own showing by the said bill, that it is not en-

titled to the relief prayed by the said bill against these defendants, or any of the defendants.

III.

That said complainant has not in and by its said bill stated such a case as doth or ought to entitle it to the relief thereby sought and prayed for, from or against these defendants, or any of them.

IV.

That it appears upon the face of the bill that the complainant has an adequate remedy at law.

The defendants demurred to Paragraphs VIII and IX of the bill of complaint, and to each paragraph thereof, (Pages 25 and 26, Record) upon the following grounds:

I.

That it appears from the facts set forth in said paragraphs, and in each and all of them, that complainants are not entitled to the relief, or any part thereof, prayed for from or against these defendants, or any of them.

II.

That the facts as set out in said paragraphs, and each of them, do not state a cause of suit, or any part of a cause of suit against these defendants, or any of said defendants.

(Record, page 51)

The defendants likewise demurred specially to all of Paragraphs X, XI, XII, XIII, XIV, XV, and XVI, (Record, pages 33 to 47) upon the following grounds, to-wit:

I.

That it appears from the facts set forth in said paragraphs, and in each and all of them, that complainants are not entitled to the relief, or any part thereof, prayed for from or against these defendants, or any of them.

II.

That the facts as set out in said paragraphs, and each of them, do not state a cause of suit, or any part of a cause of suit, against these defendants, or any of said defendants.

(Record, page 52).

The Circuit Court upon a hearing of these demurrers entered an order sustaining the general demurrer and the appellants, electing to stand upon their complaint, the court entered its decree dismissing the cause and the bill of complaint (Record, page 59).

The Circuit Court filed an opinion in support of its ruling sustaining the demurrer (Record, pages 54 to 58).

Specification of Errors.

I.

That said Circuit Court erred in sustaining the demurrers and each thereof of the defendants to the bill of complaint herein.

II.

That said Circuit Court erred in dismissing said cause and said bill of complaint.

III.

That said Circuit Court erred in deciding that plaintiffs are not entitled to the relief

prayed for in their bill of complaint; or to any relief whatever in said cause.

IV.

That said Circuit Court erred in refusing to grant to plaintiffs the relief prayed for in their bill of complaint herein.

V.

That said pretended order of September 21, 1910, of the Railroad Commission of Oregon, is void and of no force and effect, in this :

(a) That thereby the shippers and other persons who may avail themselves of the said class rates so attempted to be ordered into effect, will take the property of plaintiffs for private use without just or any compensation, and without the consent of plaintiffs, in violation of Section 18, of Article I of the Constitution of Oregon, which provides that private property shall not be taken for public use, nor the particular services of any man be demanded without just compensation, nor, except in case of the state, without such compensation first assessed and tendered.

That said order of said Railroad Commission is unreasonable, unjust, and arbitrary,

and particularly in this : that if the same is enforced, it will deprive the Southern Pacific Company of earnings to the amount of \$156,072.48 annually, which it is entitled to collect and receive in excess of the revenues that would be derived from the enforcement of said order, so as to enable plaintiffs, to receive a just and fair return upon the property of plaintiffs.

(b) Said Railroad Commission Act is void and of no force and effect in this : that it is an attempt to give to said defendants Campbell, Aitchison and Miller, collectively known as "Railroad Commission of Oregon," jurisdiction, power and authority to exercise legislative, executive and judicial powers, contrary to and in violation of said Section 1, of Article III of the Constitution of the State of Oregon, which provides that : "The powers of the government shall be divided into three separate departments,—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duty under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

(c) Said Railroad Commission of Oregon in passing upon said class rates upon its own initiative, and hearing the testimony of

shippers, and in taking said testimony in relation thereto, attempted to and did exercise judicial functions; and in making said order, exercised legislative and judicial functions; both and each in violation of said Section 1, Article III, as aforesaid.

(d) Said Railroad Commission Act is void and of no force and effect in this: that it violates Section 21, Article I, of the Constitution of the State of Oregon, which provides that: "No *ex post facto* law, or law impairing the obligations of contracts, shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution; Provided, that laws locating the capital of the state * * * may take effect or not, upon a vote of the electors interested."

(e) Said Railroad Commission Act is void and of no force and effect in this: that it violates Section 21, Article I, of said Constitution of Oregon, in this: that it is expressly provided that the said Railroad Commission of Oregon shall have and exercise authority which, when exercised, shall take effect upon their orders, and not by virtue of any law passed by the Legislative Assembly of the state.

(f) Said Railroad Commission Act is

void and violative of the Constitution of the State of Oregon in this: that it violates Section 1, Article VII, which provides that: "The judicial power of the state shall be vested in a Supreme Court, Circuit Courts, and County Court, which shall be courts of record, having general jurisdiction, to be defined, limited and regulated by law, in accordance with this Constitution," and particularly in this, that the said Act undertakes to deprive the complainants and all other persons of their right to contest in the courts of the state, authorized by said Section 1, Article VIII, or of any court other than the Circuit Court of the State of Oregon, for Marion County; and that the said Act is a denial to complainants and other persons of the equal protection of the laws, and deprives the complainants and other citizens of other states of the right to litigate their cause of suit in the courts of the United States, and as such is violative of the Fourteenth Amendment to the Constitution of the United States, which, among other things, provides:

"All persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any persons of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

"That the said order of the said commission so attempted to be made on September 21, 1910, is void and of no force and effect, in this: that if enforced it will deprive plaintiffs of their property without due process of law, and will prevent plaintiffs from receiving a just or any return upon their properties sufficient to enable plaintiff, the Oregon & California Railroad Company, to pay its stockholders any returns or dividends upon any of its capital stock whatsoever.

(g) Said Railroad Commission Act is void and of no force and effect in this: that it violates Article I, Section 8, Paragraph 3 of the Constitution of the United States, which provides: "Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and is violative of Article I, Section 18, of the Constitution of the United States, which provides: "Congress shall have power to make all

laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof," and particularly in this: that the said act of the Legislative Assembly of the State of Oregon attempts to confer upon the Railroad Commission of Oregon jurisdiction over interstate commerce, and does not limit its power and authority to commerce wholly within the State of Oregon; and particularly, further, in this, that the said Railroad Commission Act necessarily attempts to and does confer upon the said Railroad Commission authority and power to take into consideration, in determining and fixing any rate for the carriage of freight or passengers upon the lines of plaintiffs within the State of Oregon, the earnings of the said plaintiffs derived from interstate traffic.

(h) Said order so attempted to be made as aforesaid, on September 21, 1910, is void and of no force and effect in this: that said order, if enforced, would violate Article I, Section 8, Paragraph 3, of the Constitution of the United States, and would violate Article I, Section 18, of the Constitution of the United States, hereinbefore set out, and

would be in conflict with the Act of February 4, 1887, entitled, "An Act to regulate Commerce," and the amendments thereto, and particularly the "Act to regulate Commerce," as amended June 18, 1910, in this, that the said order directly, materially, and substantially affects the rates upon practically all the interstate shipments of plaintiffs.

(2) Said Railroad Commission Act is void and of no force and effect in this: that it provides for excessive, unusual penalties, fines, and punishments, and thereby deprives the plaintiffs and other common carriers and citizens of the United States of the equal protection of the laws, and thereby takes property of the plaintiffs without due process of law.

(3) Said Railroad Commission Act and the said pretended order of September 21, 1910, and each thereof, is void and of no force and effect in this: that the same is violative of Section 10, of Article I, of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, and particularly in this, that the said Railroad Commission Act and the said pretended order are and each of them is violative of the contract rights of plaintiffs under the Articles of Incorporation of the Oregon & California

Railroad Company and its predecessors in interest, and under the Constitution and laws of the State of Oregon, and particularly under Section 2, Article XI of the Constitution of the State of Oregon, and Section 36 of Chapter 7, of the Miscellaneous Laws of the State of Oregon, being Section 34 of the Act of the Legislative Assembly, approved October 14, 1862, providing for private corporations and the appropriation of private property therefor, hereinbefore specifically set out.

(k) Said order is void and of no force and effect in this: that the pretended reduction of said class rates is based upon the arbitrary approval of Class 1, now in effect by plaintiff, Southern Pacific Company, and an arbitrary spread between said class rates, adopting the arbitraries of 100 per cent for first class, 85 per cent of first class for second class, 70 per cent of first class for third class, 60 per cent of first class for fourth class, 50 per cent of first class for fifth class, 50 per cent of first class for Class A, 40 per cent of first class for Class B, 30 per cent of first class for Class C, 25 per cent of first class for Class D, and 20 per cent of first class for Class E, which said arbitrary classification and spread, and each thereof, was adopted by the said Railroad Commis-

sion in making said pretended order, and was so adopted arbitrarily and without any reference to the distance such traffic should be moved, or the character or nature of the traffic, or the service to be performed, or the compensation that should be paid therefor, and said classification is capricious and not based upon any fair consideration.

Plaintiffs further show that under said arbitrary spread or the application of said percentage to said class rates, the largest reduction is effective at points on said lines more difficult and expensive to operate by reason of mountain chains and physical difficulties.

Said pretended order is void and of no force and effect in this ; that the rates sought to be prescribed by said order, in lieu of existing rates, are confiscatory of the property of plaintiffs, and will deprive plaintiffs of their property without compensation, and without due process of law.

The demurrer presents the single question : does the bill of complaint state facts sufficient to entitle complainants to the relief prayed for, or to any relief ?

SUMMARY OF FACTS STATED IN BILL OF COMPLAINT.

The facts well-pleaded, succinctly summarized, omitting formal and jurisdictional averments, are :

That the Oregon & California Railroad Company is the owner of 670 miles of railroad, with stations, terminals and appurtenances belonging thereto, of the total value of \$43,594,886.73, leased to the Southern Pacific Company on July 1, 1887, for the period of forty years from that date, under an Act of the Legislative Assembly approved February 16, 1887, which authorized said lease ;

That on September 21, 1910, the Railroad Commission, pursuant to an investigation upon its own initiative, made an order that the Southern Pacific Company should cease and desist from charging, imposing and collecting for the intrastate transportation of freight taking class rates under the provisions of the Western Classification and exceptions thereto, the rates then charged, collected and imposed, and that in lieu thereof should in future charge, collect and impose the rates specifically set out and should make the necessary changes in its tariffs and file

the same with the Commission on or before twenty days from the date of service of the order, which order was served on September 23, 1910, and would have become effective under its terms, October 13, 1910.

That the Railroad Commission Act, and order, and each of them, and all the tariffs, rates, charges and regulations prescribed by said order, in violation of the Constitution of the United States and of the Act of Congress approved February 4, 1887, entitled, "An Act to regulate Commerce," and of the acts amendatory thereof and supplemental thereto, and particularly the Act of June 18, 1910; and likewise in violation of the Constitution of the State of Oregon, as particularly set out;

That the revenue of complainants derived from the transportation of interstate freight is large, and the portion thereof affected by the order, if enforced, will exceed \$2,000, exclusive of interest and costs;

That the complainants have connection with the Union Pacific Railroad Company, Oregon Short Line Railroad Company, Chicago & Northwestern Railroad Company, Chicago, Rock Island & Pacific Railway Company, Chicago, Milwaukee & St. Paul Railway Company, Oregon

Railroad & Navigation Company, Northern Pacific Railroad Company, Spokane, Portland & Seattle Railway Company, Great Northern Railway Company, with all-rail connection at Portland, Oregon, and as such engaged in the movement of interstate commerce between Chicago, Milwaukee, Duluth, St. Paul, Minneapolis, St. Louis, Granger, Wyoming, Council Bluffs, Iowa, Spokane, Washington, and many other shipping points in other states of the United States ;

That Southern Pacific Company with its connecting carriers is engaged in interstate commerce from New Orleans, La., Ogden, Utah, El Paso, Texas, Los Angeles, San Francisco, and other points, in the State of California, with all-rail connections into the City of Portland, and is engaged in moving interstate commerce of all kinds from these interstate points in other states than the State of Oregon, to Portland and East Portland, in said state, and that all of these connecting carriers have through published tariffs, and are engaged in the movement of interstate commerce not only to Portland and East Portland from all said points in other states, but to all points on the lines of Southern Pacific Company in Oregon, applying to such shipments the

local rates in effect and attempted to be modified by the order of September 21, 1910;

That all said interstate traffic handled by Southern Pacific Company or subject to movement over its lines in Oregon, is materially affected by ocean competition on all traffic moved out of Los Angeles and San Francisco, California, and other Bay points, in the State of California, as well as interior points in the State of California, carrying a local rate sufficient to induce movement to ocean points, which competition extends to transportation of interstate commerce from said points to Portland and East Portland, Oregon, and all points on the lines of Southern Pacific Company in Oregon, and that the reduction of such rates attempted to be effected by said order of September 21, 1910, directly and immediately affects the movement of all said interstate traffic (Record, page 29).

The particular tariffs under which this interstate commerce is moved are set out and specifically described in the bill of complaint, and it is specifically alleged that Local and Joint Freight Tariff No. 235-A, naming class and commodity rates for transportation of freight between Portland, East Portland, Portland (Jefferson Street), Oregon, and points on lines of

Southern Pacific Company in Oregon, governed, except as otherwise provided in tariff, and as amended by the Western Classification No. 47 (F. O. Becker, Agent, I. C. C. No. 5) supplements thereto and reissues thereof, which rates are attempted to be reduced by the order of September 21, 1910, is filed with the Interstate Commerce Commission, bearing I. C. C. No. 3265, thereby prescribing the use of these rates on all interstate traffic moving through Portland and destined to points on the Southern Pacific Company's lines in Oregon, which tariffs are duly filed with the Interstate Commerce Commission as required by law, together with tariffs on all interstate commerce moved by all transcontinental railroads described, moving into Portland and East Portland, and carrying interstate traffic destined to Portland and East Portland and on the lines of Southern Pacific Company, in Oregon, all of which said tariffs so filed are required to be observed by law;

That the tariffs listed, Southern Pacific Company (Pacific System, Lines in Oregon), Local and Joint Freight Tariffs, specifically set out, show through class and commodity rates from a large number of shipping points in California on the line of Southern Pacific Company, to all

points in Oregon on the lines of Southern Pacific Company in Oregon, which rates are made up by using the ocean competitive rate from San Francisco and other Bay points, to Portland, adding thereto the local class rates out of Portland and East Portland, to points on lines of Southern Pacific Company, in Oregon, and it is in terms specifically alleged, "that any reduction of existing class rates, attempted as in said order of said Railroad Commission, hereinbefore set out, directly, immediately and materially affects, changes and alters the said rates on said interstate shipments, thereby reducing said interstate rates to the extent of the said attempted reduction of the said class rates so attempted to be ordered into effect by said order No. F-125."

That the said order No. F-125, so attempted to be made as aforesaid, if put into effect, will materially and directly affect all interstate freight traffic of complainants or all other common carriers moving traffic to Portland and East Portland, and to points on the line of Southern Pacific Company, in Oregon, and thereabout complainants further allege and show that to comply with the said order aforesaid, so attempted to be made by the said Railroad Commission, reducing class

rates from Portland to points on the lines of Southern Pacific Company, in Oregon, would materially affect and reduce interstate rates (Record, page 29).

It will thus be seen that it is charged by the bill of complaint, as a fact and not as a conclusion of law, that the reduction of existing class rates, if put into effect, pursuant to the order of September 21, 1910, would directly, immediately and materially affect, change and alter the rates on all interstate shipments, and that the interstate freight traffic of the complainants and all other carriers moving traffic to Portland and East Portland, and to points on the lines of the Southern Pacific Company in Oregon, would be materially and directly affected by the enforcement of this order, and that if this order was enforced it would materially affect and reduce interstate rates.

It is further alleged that class rates from Portland, South, covered by the order, are used as basing rates on traffic originating beyond Portland, and form a portion of the through rate on this traffic having origin beyond the boundaries of the State of Oregon and destined to points on Southern Pacific Company's lines in Oregon, and that there is but one exception in the appli-

cation of class rates from northern California points, north of Marysville, to southern Oregon points, and with this exception, all traffic subject to application of class rates, originating in California, south of Marysville, and in every other state of the United States, destined to points on the Southern Pacific Company's lines in Oregon, is transported at through rates obtained by adding to the rate applying to Portland, the class rate from Portland to destination, and that some of the tariffs filed with the Interstate Commerce Commission, applicable to said interstate business, provide rates on traffic destined to points on the Southern Pacific Company's lines in Oregon, specifically authorize the addition of class rates from Portland to destination, over established routes which do not require that the traffic be transported through Portland, naming these specific tariffs.

It further appears from specific averments of the bill of complaint, in this regard, that the through interstate rate from eastern shipping points to points on the Southern Pacific Company's lines in Oregon, except as otherwise provided, are made up by adding to the terminal rates shown, the local rate published for use upon interstate traffic, which said local rates are pres-

ent class rates from terminals to points of destination, and it is shown by specific illustration, as applying to syrup, that the reduction of this interstate rate caused by the order of September 21, 1910, would be, from New York to Eugene, from \$1.61 per one hundred pounds to \$1.53 per one hundred pounds, in less than carload lots, and from \$1.18 per one hundred pounds to \$1.08 per one hundred pounds, in carload lots. A like effect would govern all other points south of Portland, on lines in Oregon, as to all of the traffic covered by these class rates which originated outside of the State of Oregon, and destined to Portland or to points on Southern Pacific Company's Lines in Oregon South of Portland.

It is respectfully submitted that it is fully and specifically charged that the order of September 21, 1910, attempting to reduce the class rates out of Portland to all points on Southern Pacific Company's lines in Oregon, directly and immediately affects and reduces the interstate rate on all traffic handled by Southern Pacific Company, and reduces that rate automatically to the extent of the reduction of the class rates attempted to be made, and it is not apparent that these allegations are conclusions of law. This

respectfully submitted that the facts could not be more clearly or distinctly or succinctly stated in these particulars.

By Paragraph X it appears that the paid-up capital stock of the Oregon & California Railroad Company is \$19,000,000; the first mortgage bonds outstanding \$17,745,000; and that on June 30, 1909, the unsecured indebtedness in favor of Southern Pacific Company, for advances toward operation, maintenance, and renewal of the properties, after applying all of the receipts from operation to payment of operating expenses, taxes, interest on bonded debt, and other reasonable and legitimate expenses necessarily attending the operation of the properties, was \$3,207,088.57, and that this deficit on June 30, 1906, was \$6,222,057.20; that the outstanding \$12,000,000 preferred stock represented the cost of the first 198 miles of railroad from Portland to Roseburg, and that \$7,000,000 common stock represented the unpaid accrued interest thereon, and that the bonded indebtedness secured by first mortgage of July 1, 1887, to the Union Trust Company, was created for the purpose of refunding the outstanding indebtedness of the Oregon & California Railroad Company, and for the purpose of construction, extension, addition, and

betterment to the property as original capital, and was used in the extension, construction, and betterment of said properties, or redemption of valid outstanding bonds then existing, which had theretofore gone into the construction or acquisition or betterment of these properties; that all of these properties, on September 21, 1910, were under lease to the Southern Pacific Company of date July 1, 1887, for the term of forty years, under which lease the lessee was to keep the leased property in good order, condition, and repair; to operate, maintain, add to, and better the same at its own expense; pay all taxes legally assessed against the same or levied thereon; pay interest as it should mature on the first mortgage bonds, and the net earnings, if any, pay over to the Oregon & California Railroad Company. If the net earnings should exceed the amount of seven per centum upon the par value of the preferred stock, and six per centum upon the par value of the common stock, then the lessee should be entitled to receive and retain for its own use any and all excess of such balance of net earnings and income, over and above the said seven per centum and the said six per centum. That under its lease the lessee has honestly and faithfully and carefully

kept a full account of the gross operating revenues, receipts and income of the property, and of the expenditures incident thereto, including operating expenses, taxes, and interest upon bonded indebtedness, and other reasonable and necessary expenses, and that notwithstanding the lessee has so operated the properties honestly and economically and has carefully managed and operated the same, "the said properties have never at any time yielded any net income applicable to the payment of dividends upon said capital stock or any part thereof at any time during said lease, and the said properties do not now yield, under existing rates and tariffs, any net revenues from which any payment can be made by way of dividend upon said capital stock or any part thereof; that notwithstanding the faithful, careful, and economical management and administration of said properties by said Southern Pacific Company under reasonable tariffs for the movement of freight and passenger traffic during all of said time, there was a constantly increasing deficit, resulting from said operation, due and owing to the Southern Pacific Company, and the same reached, on June 30, 1906, to the extraordinary figure and sum of \$6,222,037.20, which sum was reduced for the

year ending June 30, 1909, to the sum of \$3,207,008.37, as aforesaid."

It is further alleged in this paragraph that the properties are of the reasonable value of a sum representing the outstanding bonded indebtedness and the deficit, and the capital stock, which the court will observe is an allegation that the properties are of the value of \$39,952,008.37.

It is further alleged that the complainants are entitled to receipts and earnings from the operation of said properties, sufficient to pay a reasonable and fixed sum as annual interest upon said indebtedness, and as a dividend upon said stock, amounting to at least five per cent. per annum, upon said bonded indebtedness, and at least six per cent. per annum upon said unsecured indebtedness, and a dividend of at least six per cent. or seven per cent. per annum upon said capital stock.

These averments of fact as to the financial condition of the property are admitted to be true by the demurrer. That is to say, it is admitted that the properties are at least of the value of \$39,952,008.37, and that after payment of all the necessary operating expenses incurred in economical administration of the property, including taxes and interest upon the bonded indebtedness,

the property has never at any time yielded any net income applicable to the payment of any dividend upon the capital stock.

It is further admitted by the demurrer that the Oregon & California Railroad Company is entitled to receipts and earnings sufficient to pay the interest upon the secured indebtedness at the rate of five per cent. per annum, and upon the unsecured indebtedness at the rate of six per cent. per annum, and a dividend upon the capital stock of at least six per cent. or seven per cent. per annum.

The receipts and disbursements of the property for the year ending June 30, 1902, to the year ending June 30, 1909, are set out in Paragraph X of the bill of complaint, (Record, pages 33 to 37) and are as follows :

RECEIPTS.

Year ending June 30, 1902, gross earnings.....	\$3,509,901.37
Year ending June 30, 1903, gross earnings.....	4,004,983.14
Year ending June 30, 1904, gross earnings.....	4,308,215.05
Year ending June 30, 1905, gross earnings.....	4,390,401.10

Year ending June 30, 1906, gross earnings.....	\$5,891,087.67
Year ending June 30, 1907, gross earnings.....	6,451,050.00
Year ending June 30, 1908, gross earnings.....	6,918,414.00
Year ending June 30, 1909, gross earnings.....	7,104,081.00

DISBURSEMENTS.

Year ending June 30, 1902, gross earnings.	3,734,380.40
Year ending June 30, 1903, gross earnings.....	4,120,413.08
Year ending June 30, 1904, gross earnings.....	4,319,970.87
Year ending June 30, 1905, gross earnings.....	5,321,301.39
Year ending June 30, 1906, gross earnings.....	5,956,399.61
Year ending June 30, 1907, gross earnings.....	6,128,729.00
Year ending June 30, 1908, gross earnings.....	5,968,601.00
Year ending June 30, 1909, gross earnings.....	5,839,698.00

The operating revenues for the
year ending June 30, 1909,

amounted to.....	\$6,998,949.57
Operating revenues, intrastate...	2,915,434.70
" " interstate...	3,804,613.65
Passenger revenues, intrastate...	1,507,107.24
" " interstate...	1,606,131.95
Freight revenues, intrastate.....	1,321,216.72
" " interstate	2,168,825.86

That the interstate freight business is about 64% more than the intrastate freight business, and that the annual loss affected by the reduction would be \$156,072.48, notwithstanding the property under present rates, which are alleged to be reasonable, yield nothing out of which to pay any dividend on the capital stock or any part thereof, admitted to be a sum equal to \$19,000,000, and being nearly one-half of the admitted value of the property.

The table of receipts and disbursements does not purport to show any more than gross earnings and expenditures, and takes no note of payment of taxes, fixed charges, or dividends. It covers a period of eight years, and the total receipts for these years are \$42,578,133.33, and the total expenditures for these eight years, \$41,389,493.35, making a sur-

plus on eight years' business of \$1,188,639.98, with nothing paid on account of dividends upon capital stock, or, if figured upon the basis of value of the property admitted, leaving nothing as annual interest on the investment for this period of time, in excess of the capital represented by the bonded debt. This \$1,188,639.98, when applied to deficits existing for the period preceding June 30, 1909, still left at that date a deficit of \$3,207,008.37.

It is further specifically alleged that existing local rates affected by the order of September 21, 1910, are reasonable and just, and are made as low as the situation of the properties and the competitive conditions of the business, both intrastate and interstate, will permit or allow, and that the said compensation charged upon said existing tariffs is reasonable and just, and affords but slight compensation above the cost of service; that the decrease attempted to be made, if enforced, will deprive the companies of large sums of annual revenues and compel the companies to give the use of their properties without reasonable or just compensation for such services, and will deprive the companies of their properties without due or reasonable compensation (Record, page 37).

It is further alleged that the reduction will compel the companies to increase their rates upon traffic not affected by the order, and particularly the products of the soil, forest, and farm, many of which now receive and enjoy terminal rates, including such commodities to be sold and consumed in the markets of the world, thereby compelling the companies to discriminate against such products to the injury of the companies and of the public.

That the largest decrease in the class rates affects classes four and five, and that under these classes, consisting of staples, particularly groceries and hardware, are moved both intrastate and interstate, and that the decrease as to such commodities under such classes approximates about twenty per cent. of the existing rates, and that this decrease will be largely, if not mainly, of benefit only to jobbers and dealers in such staple products, which jobbers and dealers have made and now are making large and excessive profits under existing class rates, and will, if put into effect, still further increase the profits of these jobbers and dealers, at the expense of the companies and of the public at large (Record, page 37).

It will thus be seen that the averments of the

complaint challenge the reasonableness of the rates prescribed by the order, and thereby tender a material issue of fact.

In Paragraph XI, (Record, pages 37 and 38), it is alleged that on June 30, 1909, the Oregon & California Railroad Company owned 666.07 miles of main line track, and 114.06 miles of side track, with the usual stations and terminals incident to operation, all of which property is devoted to public use and upon which the companies are entitled to a just and reasonable return, and "upon which your orators have never received for the stockholders of the Oregon & California Railroad Company anything in dividends."

That two lines of railroad are maintained and operated on the west side of the Willamette River, and two on the east side of the Willamette River, in competition with each other, with the Willamette River between them; that the main line passes over two mountain ranges in a difficult and expensive country in which to operate and maintain railroads, and that all interstate business coming from and going to California and all points beyond, passes over the Siskiyou Mountains, one of these mountain ranges; that these four lines of railroad are operated in the Willa-

mette Valley, sixty miles in width, for 125 miles south from Portland, with a navigable river in the center, navigable for common carriers by boat to Albany and Corvallis, in open and active competition, and that the City of Portland is located on the Willamette River twelve miles from the Columbia River, at the head of ocean navigation for deep-sea and coast-wise vessels, creating competition in business from San Francisco, Los Angeles, and other Pacific ports, to Portland; and that the Oregon Electric Railway Company is actively operating and maintaining in competition with the line of railroad of complainants, an interurban electric line for the carriage of freight and passengers from Portland to Salem, and from Portland to Forest Grove, with transcontinental connection with transcontinental competitors at Portland, and is about to extend its line to McMinnville, Albany, and Eugene, Oregon;

That the carload merchandise tonnage received at points on lines of Southern Pacific Company for one year, is 99,264 tons, yielding a revenue of \$777,984.00, all of which will be directly affected by the application of class rates, and 15,203 tons of carload commodities, yielding a revenue of \$210,888.82, likewise affected, or a

total of 114,467 tons, yielding a revenue of \$1,088,872.82, or about thirty-nine per cent. of the total tonnage and seventy-four per cent. of the total revenue, the whole of which is upon freight received; that the total freight revenue for the year ending June 30, 1909, was \$3,490,042.58, of which \$1,088,872.82 was revenue derived from freight received, affected by the application of class rates, amounting to thirty-one per cent. of the total freight revenues of the companies, and that the percentage of forwarded traffic affected by class rates would materially increase this percentage.

Paragraph XII of the complaint (Record, pages 39 and 40), pleads the incorporation of the Oregon & California Railroad Company and its predecessors in interest, under the laws of the State of Oregon, and the provisions of the law and Constitution of the state in effect at the time, under which it claimed that the companies have a vested right to collect and receive such tolls or freights for transportation as the companies may prescribe, and that this order of the Railroad Commission, if put into effect, will impair the obligation of the contract thus made by these Articles of Incorporation, with the State.

Paragraph XIII of the complaint (Record,

pages 40-42), sets out Sections 33 and 51 of the Railroad Commission Act. By Section 51, it appears that if the companies should omit to observe the order of September 21, 1910, they would be liable to any one injured thereby, in treble the amount of damages sustained in consequence of such violation, together with a reasonable counsel or attorney's fee to be fixed by the court, in every case of recovery, which attorney's fee should be fixed and collected as part of the costs in the case. It is further provided that any recovery authorized by this section should in no manner affect a recovery by the state of the penalty prescribed for such violation. The penalty there referred to is that provided in Section 53 of the Railroad Commission Act, which provides that for every such violation, failure or refusal, the railroad shall forfeit and pay into the State Treasury a sum of not less than \$100.00 nor more than \$10,000.00 for such offense. This is in addition to the penalty of treble damages, including attorney's fees, awarded to every shipper who might be injured by the failure or neglect of the railroad company to put these rates into effect.

Section 33, as amended February 23, 1909, set out in Paragraph XIII, provides the manner by

which the railroad company may, for cause shown, obtain a stay of enforcement of the order upon giving a bond approved by the court, but this bond is conditioned that the railroad company shall answer for all damages caused by the delay in the enforcement of the order, and all compensation for whatever sums for transportation any person or corporation shall be compelled to pay in excess of the sum such person or corporation would have been compelled to pay if the order of the Commission had not been suspended. Any person paying charges found to be excessive shall have a claim for the excess, and unless refunded within thirty days after written demand made after final judgment, may recover the same by action against the railroad and the sureties on the bond.

It is further alleged that the Railroad Commission Act is oppressive and confiscatory, and affords to complainants no adequate or sufficient remedy to protect the property of complainants; that the provisions of the Act are not uniform and are unequal in their application to the various persons and transportation companies affected thereby, and that by the terms of the Act complainants are subjected to excessive penalties in the event

they should refuse to obey or observe the order, and that the Act and order deny to complainants and each of them the equal protection of the law, and deprive them and each of them of their property and the property of each of them without due process of law, and that the Railroad Commission Act and order are, and each of them is, by reason of the premises, unconstitutional and void.

The allegations of Paragraph XIII, (Record, pages 40-42) present legal questions and in succinct and direct terms attempt to raise the questions of law suggested, further urging that under Section 1 of Article III of the Constitution of the state, providing that the powers of the government shall be divided into three departments, the legislative, the executive (including the administrative), and the judicial, and providing that no person charged with official duties under one of these departments shall exercise any of the functions of another, that the Railroad Commission Act is void in that thereby the Commission is clothed with legislative, executive and judicial powers.

By Paragraph XIV, (Record, pages 42 and 43) it is alleged that the defendants threaten to prosecute complainants for the penalties pro-

vided by the Act, and that unless restrained they will institute proceedings against the complainants and particularly against the Southern Pacific Company to compel it to publish and put into effect these rates; that said proceedings will thereby compel complainants to observe and put into effect rates prescribed in said order "causing complainants great and irretrievable loss and damage, and divesting complainants of their property without due process of law, and confiscating to the use of the public the property of the complainants in excess of about \$300,000.00 per annum, and will expose your orators, and particularly the Southern Pacific Company, to the danger of excessive fines and penalties provided for in said Act, and will, in effect, confiscate the property of your orators."

It is further alleged by Paragraph XIV that these proceedings would compel the complainants to put into effect rates and regulations governing and affecting interstate traffic passing over the lines of railroad of complainants, and the other railroads mentioned in the bill of complaint, contrary to the Act of February 4, 1887, and the amendments thereto, and the regulations of the Interstate Commerce Commission, and contrary to the terms, provisions, tariffs and

regulations prescribed by and now appearing in the tariffs hereinbefore issued by the complainants and other carriers engaged in interstate commerce, and concurred in by other railroads mentioned in the bill of complaint, which have been duly filed with the Interstate Commerce Commission, and are now in full force and effect.

It is respectfully submitted that this is a direct allegation that the action of the Railroad Commission in attempting to enforce the order of September 21, 1910, by these suits and actions, to recover penalties, would compel the Southern Pacific Company to put into effect rates governing and affecting interstate traffic mentioned, notwithstanding existing tariffs in effect and having the full force of law, filed with the Interstate Commerce Commission.

It is further alleged that unless restrained and enjoined from so doing, the defendants threaten to and will subject complainants to liability to pay fines and penalties in such sums as will confiscate the property of complainants and will subject them, through the loss of traffic and earnings therefrom, to great and irretrievable loss, damage, and injury.

By Paragraph XV (Record, pages 43-46), it is averred in direct terms that the order of the Rail-

road Commission is void and of no force and effect, in this:

(a) That thereby the shippers and other persons who may avail themselves of the said class rates so attempted to be ordered into effect, will take the property of complainants for private use without just or any compensation, and without their consent, in violation of Section 18, of Article I, of the Constitution of Oregon; that the order is unreasonable, unjust, and arbitrary, and particularly in this: that if enforced it will deprive the Southern Pacific Company of earnings to the amount of nearly \$300,000.00 annually, which it is entitled to collect and receive in excess of the revenues that would be derived from the enforcement of the order, so as to enable the complainants to receive a just and fair return upon the property of complainants.

(b) That the Railroad Commission Act is void and of no force and effect in that it is an attempt to give the Railroad Commission jurisdiction, power, and authority to exercise legislative, executive and judicial powers, contrary to and in violation of Section 1, of Article III of the Constitution of the State of Oregon.

(c) That said Railroad Commission of Oregon, in passing upon said class rates and

hearing testimony of shippers, and taking testimony in relation thereto, attempted to and did exercise judicial functions, and in making the order exercised legislative and judicial functions, both and each in violation of Section 1, Article III of the Constitution.

(d') That the Railroad Commission Act is void and of no force and effect in that it violates Section 21, Article I, of the Constitution of the State of Oregon, which provides that no *ex post facto* law, or law impairing the obligation of contracts, shall be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution.

(e) That the Railroad Commission Act is void and of no force and effect in that it violates Section 21, Article I, of the Constitution of the State of Oregon, in this: that it is expressly provided that the Railroad Commission shall have and exercise authority which, when exercised, shall take effect upon their orders, and not by virtue of any law passed by the Legislative Assembly of the State.

(f) Said Railroad Commission Act is void in that it violates Section 1, Article VII, of the Constitution of the State of Oregon,

which vests the judicial power of the State in the Supreme, Circuit, and County Courts; and particularly in this, that the act undertakes to deprive the complainants and all other persons of their right to contest in the courts of the state, authorized by this section, or of any court other than the Circuit Court of the State of Oregon, for Marion County, and that the act is a denial to complainants and other persons of the equal protection of the laws, and deprives the complainants and other citizens of the right to litigate their cause of suit in the courts of the United States, and as such violates the Fourteenth Amendment to the Constitution of the United States; that the order of Sept. 21, 1910, is void, in this: that if enforced it will deprive complainants of their property without due process of law, and will prevent complainants from receiving a just or any return upon their properties sufficient to enable the Oregon & California Railroad Company to pay its stockholders any return or dividend upon any of the capital stock whatsoever.

(g) That said Railroad Commission Act is void in that it violates Article I, Section 8, Paragraph 3, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with

foreign nations and among the several States, etc., and is violative of Section 18, Article I, of the Constitution of the United States, which gives authority to Congress to pass the necessary laws for carrying into execution the interstate commerce clause of the Constitution; and that the Railroad Commission Act attempts to confer jurisdiction over interstate commerce, and does not limit its power and authority to commerce wholly within the State of Oregon, and that it confers upon the Railroad Commission authority and power to take into consideration, in determining and fixing any rate for the carriage of freight or passengers upon the lines of complainants within the State of Oregon, the earnings of complainants derived from interstate traffic.

(4) That said order is void in this: that if enforced it would violate Article I, Section 8, Paragraph 3, and Article I, Section 18, both of the Constitution of the United States, and would be in conflict with the Act of February, 4, 1887, entitled, "An Act to Regulate Commerce," and the amendments thereto, and particularly as amended June 18, 1910, in this: "that the said order directly, materially and substantially affects the rates upon practically all the interstate shipments of your orators." It might be

suggested that this is another averment of a material fact.

(i) Said Act is void in this: that it provides for excessive, unusual penalties, fines and punishments, and thereby deprives the complainants of the equal protection of the laws, and takes their property without due process of law.

(j) The Act and order and each thereof is void in this: that each violates Section 10, Article I, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, and particularly in this, that the order and act violate the contract rights of the complainants under the Articles of Incorporation of the Oregon & California Railroad Company and its predecessors in interest, under the Constitution and laws of the State of Oregon, and the Act of Congress of October 14, 1862, by which the companies were authorized to fix the tolls and charges for their services.

(k) Said order is void and of no force and effect in this: that the pretended reduction of said class rates is based upon the arbitrary approval of Class 1, now in effect, and an arbitrary spread between said class rates, adopting the arbitraries of 100 per cent. for first class, 85 per cent. of first class for sec-

ond class, 70 per cent. of first class for third class, 60 per cent. of first class for fourth class, 50 per cent. of first class for fifth class, 50 per cent. of first class for Class A, 40 per cent. of first class for Class B, 30 per cent. of first class for Class C, 25 per cent. of first class for Class D, and 20 per cent. of first class for Class E, " which said arbitrary classification and spread, and each thereof, was adopted by the said Railroad Commission in making said pretended order, and was so adopted arbitrarily and without any reference to the distance such traffic should be moved, or the character or nature of the traffic, or the service to be performed, or the compensation that should be paid therefor, and said classification is capricious and not based upon any fair consideration. And your orators further show that under said arbitrary spread, or the application of said percentage to said class rates, the largest reduction is effective at points on said lines more difficult and expensive to operate by reason of mountain chains and physical difficulties."

This, it is respectfully submitted, when read in connection with the averment elsewhere in the bill of complaint that the rates prescribed by the order of September 21, 1910, are unreason-

able, is a direct challenge of the validity of this order, and a charge that "the classification and spread was arbitrarily adopted without reference to the distance such traffic should be moved, or the character or nature of the traffic, or the service to be performed, or the compensation to be paid, and that such classification is capricious and not based upon any fair consideration." We know of no other words that could challenge the reasonableness of the rates or the reasonableness of the classification in any more direct language than has been used. The demurrer admits the truth of these allegations.

(1) Said pretended order is void and of no force and effect in this: that the rates sought to be prescribed by said order, in lieu of existing rates, are confiscatory of the property of your orators, and will deprive your orators of their property without compensation and without due process of law.

The questions raised by the demurrer to the complaint are:

(1) Does the order of September 21, 1910, directly and materially affect the interstate commerce of the complainants, and does the order amount to a direct regulation of the interstate rates which the complainants are re-

quired to observe in order to move their interstate traffic to and from all points on the lines in Oregon of the Southern Pacific Company between Portland and the California State Line, and if so, is such order void as a direct regulation of and interference with interstate commerce? Is the Railroad Commission Act void because inconsistent with the amended Interstate Commerce Act?

(2) Does the bill of complaint state facts sufficient to show that the order of September 21, 1910, if put into effect, would deprive the complainants of a just and fair return upon the value of their properties?

(3) Will the court judicially review the order of September 21, 1910, and determine as a judicial question whether or not the rates ordered into effect are reasonable or unreasonable? And in this respect:

Was the reduction of class rates made by the order of September 21, 1910, based upon the arbitrary approval of Class 1, and an arbitrary spread between the class rates; and was this arbitrary classification and spread so adopted arbitrarily without any reference to the distance such traffic should be moved, or the character or nature of the traffic, or the service to be performed, or the compensation which should be paid therefor, and not based upon any fair consideration,

and are the rates prescribed by the order in lieu of existing rates confiscatory of the property of the complainants, and will these rates deprive the complainants of their property without compensation, and is it true that the rates now in effect yield to the complainants but little compensation in excess of the actual cost of movement of this traffic? That is, in excess of the cost of the service?

(4) Is such order and the Railroad Commission Act, and each of them, violative of the contract rights of the complainants under the Articles of Incorporation of the Oregon & California Railroad Company and its predecessors in interest, claimed by complainants under Section 2, Article XI of the Constitution of the State of Oregon, and Section 34 of the Act of the Legislative Assembly approved October 14, 1962? That is to say, do these Articles of Incorporation constitute a contract which cannot be impaired by the Railroad Commission Act or by the order of September 21, 1910?

(5) Is the Railroad Commission Act void because of excessive penalties and unusual burdens imposed for any refusal to observe the order of the Commission, and is the Act oppressive and confiscatory by reason of such excessive penalties and burdens imposed by the Act?

(6) Is the Act void in this, because it requires complainants to prosecute any suit to set aside any order made by the Commission, in the Circuit Court of the State of Oregon for the County of Marion, and thereby deprives the complainants of their right to litigate their cause in any other court of the state and in the courts of the United States, and is therefore violative of the Fourteenth Amendment to the Constitution of the United States.

(7) Can jurisdiction be conferred upon a court to determine, as a fact, whether or not the rates prescribed by the order of September 21, 1910, are unreasonable, and is the Act void because it provides by its express terms for a judicial review of any order of the Commission affecting rates, fares, charges, classifications, joint rate or rates, regulations, practice, or service?

(8) If the Act is valid and confers authority upon the courts to review and set aside a rate or body of rates promulgated by the Commission, when found by the court to be unreasonable, as distinguished from the inquiry as to the confiscatory character of such rate or rates, will the Federal Court administer this relief and enforce this right created by a state statute and assume jurisdiction to determine whether or not

such rates are unreasonable in and of themselves, and independently of the question whether or not the reduction effected by such rates would deprive the railroad company of a just and fair return upon its property? That is, independently of the question whether or not the reduction would amount to confiscation in whole or in part.

FOURTH.

II.

The order of September 23, 1910, upon the facts stated in the bill of complaint, necessarily and directly interferes with, regulates, and affects interstate commerce, and particularly interstate commerce moving to Portland and other Oregon line points, thereby discriminating in favor of Portland and Portland jobbers, and against points originating shipments in other states destined to Oregon line points other than Portland, and substantially burdens such interstate commerce, in violation of Section 8, Article I, of the Constitution of the United States, and is in conflict with the Act of Congress of February 4, 1887, entitled, "An

Act to Regulate Commerce," and the amendments thereto, and is therefore void.

Shoofield v. N. P. Ry. Co., 184 Fed.

765.

Louisville & N. Ry. Co. v. Eschank,

184 U.S. 27-39.

Western Union Tel. Co. v. Kansas,

226 U.S. 27, 39.

St. L. & S. F. R. Co. v. State, 26

Okla. 62, 72.

D. L. & W. R. Co. v. Stevens, 172

Fed. 395.

Hasky v. Kansas City Sm. Ry. Co.,

187 U.S. 617, 620.

Davell & Son v. Memphis, 208 U.

S. 113.

American Steel & Wire Co. v. Speed,

192 U.S. 500, 519.

Kelly v. Rhoads, 188 U.S. 1.

Wabash, etc. Ry. Co. v. Illinois, 118

U.S. 557, 570.

Rhodes v. Iowa, 170 U.S. 412.

Walter v. State of Missouri, 91 U.S.

275, 280.

Herron v. C. R. I. & P. Ry. Co.,

228 U.S. 135, 156.

Whether or not the bill of complaint sufficiently alleges that the order of September 21, 1920, directly and materially affects the inter-

state commerce of the complainants, and whether such order, read in connection with these averments, constitutes a direct regulation of interstate commerce, is, as it seems to us, not open to controversy. The demurrer admits the allegations in this respect, and they are ample and full.

The legal question involved is one of great importance. It is unnecessary in the discussion of the validity of this order, under this point, to determine the validity of the Railroad Commission Act, or to assume that a state commission cannot make any intrastate rate.

It is claimed that the order made in this case directly and necessarily interferes with, regulates, and affects interstate commerce, and particularly interstate commerce in the classes named, moving to Portland and other Oregon line points, thereby discriminating in favor of Portland and Portland jobbers, and against points originating shipments in other states destined to Oregon line points other than Portland. If such is the necessary result of the reduction made by the order, although ostensibly and nominally the order relates to traffic moved under class rates from Portland to points south on the lines in Oregon, then the order reducing the rates would

be in violation of the Interstate Commerce Act, and the rates promulgated by this order cannot be constitutionally sustained.

It may be claimed that it is optional on the part of the Southern Pacific Company to make an interstate rate from points outside of the State of Oregon to points south of Portland on its lines, by adding the local rate from Portland south. This is not true, as a matter of fact, for if Southern Pacific Company and other carriers who are competitors of Southern Pacific Company should make an interstate rate into Portland as a basing point, from Chicago, St. Louis and Atlantic seaboard points, and to points on Southern Pacific Company's lines south of Portland, as a through rate, such interstate rate could not be higher than the rate to Portland, with the local rate from Portland to the interior point, for if it were higher, all the business would come to Portland either by water or by the rail route, and the Portland jobbers would supply the dealers on Oregon line points south of Portland, thereby depriving the dealers on Oregon line points south of Portland, and the shippers and manufacturers at Chicago, St. Louis and elsewhere, of their right to have the business upon an equal rate, and in order to

prevent a discrimination in favor of the Portland jobbers and against other competitors in other states, the Southern Pacific Company and its connections would be compelled to reduce their interstate rate thus made, or else forfeit the business upon a through haul. In other words, the rates as made by the Oregon Commission affect commodities moving under these class rates, that necessarily and are largely made outside of the State of Oregon to Portland or to Oregon line points, and the rate from Chicago to Medford, on a through haul, must be the same rate as the rate from Chicago to Portland, as a basing point, with Portland to Medford added. This is so because of conditions over which the carrier has no control, and which the Oregon Commission in promulgating these rates was bound to consider.

Speaking upon this subject, Master in Chancery OTIS, in *Shepard v. Northern Pacific Co.* (184 Fed. Rep., 765), *et al.* says at p. 777 :

" Any substantial change in the basis of rates thus established and in force or in any particular rate due only to the fact that the transportation was interstate, or that it was local to a state, would have been actual, undue and unjust discrim-

ination in fact and any substantial difference in rates for the transportation of passengers, merchandise or commodities maintained by either of said companies as between traffic local to the State and traffic which goes between the State of Minnesota and either of its neighboring states, will constitute actual, undue, and unjust discrimination in fact.

* * * * *

"Superior, Wis., and Duluth, Minnesota, are situated side by side at the western extremity of Lake Superior. Each is an important business center. Conditions attending transportation to and from either of them are the same as to or from the other. The railroad companies reaching them have always accorded them and do accord them like rates in and out. They ship and receive the same kinds of freight and to and from the same localities. Any substantial difference in the rates accorded them would destroy the commerce of the city given the higher rates. The propriety of a parity of rates to and from these localities has always been recognized (p. 779).

* * * * *

"If these companies after the installation of the rates prescribed by the order for transportation within Minnesota, had continued

to maintain the former rates for transportation between Minnesota and an adjoining state, the result would have been serious discrimination against localities in the neighboring states (p. 779). * * *

"These reductions were compelled by the necessary and direct effect of the operation of the order. Had they not been made, Superior could not have competed in business in Minnesota with Duluth, Fargo, Grand Forks and Wahpeton could not have competed with Moorhead, East Grand Forks, and Breckenridge, respectively, nor could Superior have transacted business successfully with Fargo, Grand Forks, or Wahpeton. Moreover, although the Northern Pacific suffered a substantial loss in revenue from its interstate business, it had the choice of submitting to that loss or of suffering substantial destruction of its interstate commerce in articles covered by the order between these localities" (p. 780).

In other words, applying the language of Judge ORIS to the facts pleaded in the bill of complaint in the case at bar, if the Southern Pacific Company is compelled to reduce its class rates from Portland to all points south, then all commodities covered thereby, which move upon an interstate rate from Chicago and other points

in other states to Portland, and to points on the Oregon lines south of Portland, must move upon an interstate rate upon a through haul which equalizes the reduction, or else Portland jobbers and other persons desiring to ship these commodities from Portland would have the benefit of the discrimination. The penalty for obedience to this order would be a loss of the interstate business of Southern Pacific Company from all points in other states, whether moving over Southern Pacific Company lines to Portland by rail or by water, and in that way its proportion of earnings by this interstate traffic would be lost.

In *Shepard v. Northern Pacific Ry. Co.*, 184 Fed. 765, SANBORN, Circuit Judge, in a lengthy opinion, presents an exhaustive discussion of the legal questions involved, and sustains the opinion and report of Master in Chancery OTIS. In the course of the opinion the court says at p. 769:

"The first question for consideration is whether or not the orders of the Commission and the acts of the Legislature substantially burden interstate commerce, and the answer to this question must be drawn from an application of the facts which disclose their effect to the established rules of law which govern this subject.

"These orders and acts by their terms relate to intrastate fares and rates only. Counsel for the defendants insist that in the police power of the state is vested plenary authority to make and enforce them because they relate to commerce within the state only, while the complainants argue that their enforcement is beyond the power of the state because the effect of their necessary operation is substantially to burden interstate commerce, and hence to invade the exclusive domain of the nation, in violation of the commercial clause of the Constitution (Article I, Sec. 8).

"The principles and rules of law by which these orders and acts must be tried have been conclusively established by the decisions of the Supreme Court, and it will not be unprofitable to state them here again, and to bear them constantly in mind during the consideration of the facts which must determine the issue here presented.

"The power to regulate commerce among the states was carved out of the general sovereign power by the people when the national government was formed, and granted by the Constitution to the Congress of the nation. That grant is exclusive. The United States may exercise that power to its utmost extent, may use all means requi-

site to its complete exercise, and no state, by virtue of any power it possesses, either under the name of the police power or under any other name, may lawfully restrict or infringe this grant, or the plenary exercise of this power; for these are paramount to all the powers of the state, and inhere in the supreme law of the land. The fares and rates of transportation of passengers and freight in interstate commerce are national in their character, and susceptible of regulation by uniform rules. The silence or inaction of Congress relative to such a subject is a conclusive indication that it intends that the interstate commerce therein shall be free, so far as the Congress has not directly regulated it. *Welton v. State of Missouri*, 91 U. S. 275, 282, 23 L. Ed. 347; *Brown v. Houston*, 114 U. S. 622, 631, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Bowman v. Chicago, etc. Ry. Co.*, 125 U. S. 465, 485, 507, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *Walling v. Michigan*, 116 U. S. 446, 455, 456, 6 Sup. Ct. 454, 29 L. Ed. 691; *Hall v. De Cuir*, 95 U. S. 485, 490, 24 L. Ed. 547; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 570, 573, 7 Sup. Ct. 4, 30 L. Ed. 244.

"To the extent necessary completely and effectually to protect the freedom of and to

regulate interstate commerce, the nation by its Congress and its courts may affect and regulate intrastate commerce, but no farther.

"To the extent that it does not substantially burden or regulate interstate commerce a state may regulate the intrastate commerce within its borders, but no farther.

"If the plenary power of the nation to protect the freedom of and to regulate interstate commerce and the attempted exercise by a state of its power to regulate intrastate commerce, or the attempted exercise of any of its other powers, impinge or conflict, the former must prevail and the latter must give way, because the Constitution and the acts of Congress passed in pursuance thereof are the supreme law of the land, and 'that which is not supreme must yield to that which is supreme.' *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Gibbons v. Ogden*, 9 Wheat. 1, 209, 210, 6 L. Ed. 23; *Wabash St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557, 573, 7 Sup. Ct. 4, 30 L. Ed. 244; *Covington, etc. Bridge Co. v. Kentucky*, 154 U. S. 204, 211, 212, 216, 217, 222, 14 Sup. Ct. 1087, 38 L. Ed. 962; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 327, 328, 26 Sup. Ct. 491, 50 L. Ed. 772; *Cleveland, C., & St. L. R. Co. v. Illinois*, 177 U. S. 514,

517, 519, 521, 20 Sup. Ct. 722, 44 L. Ed. 868; *Mississippi Railroad Commission v. Illinois Central R. Co.*, 203 U. S. 335, 343, 27 Sup. Ct. 90, 51 L. Ed. 209; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 24, 27, 37, 30 Sup. Ct. 190, 54 L. Ed. 355; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 162, 30 Sup. Ct. 280, 54 L. Ed. 423; *Pullman Company v. Kansas*, 216 U. S. 56, 65, 30 Sup. Ct. 232, 54 L. Ed. 378; *Hall v. De Cuir*, 95 U. S. 485, 488, 490, 497, 498-513, 24 L. Ed. 547; *Bowman v. Chicago, etc. Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *Wellon v. Missouri*, 91 U. S. 275, 280, 23 L. Ed. 347; *Crutcher v. Kentucky*, 141 U. S. 47, 57, 58, 59, 11 Sup. Ct. 851, 35 L. Ed. 649.

" Thus a part of every interstate transportation is carried on within the state of its initiation and concluded within another state, but neither state may fix or regulate the fares or rates of the part within its borders, because the authority so to do is requisite to the complete preservation of the freedom of, and to the untrammelled regulation of, that transportation, and this power is vested exclusively in the nation. *Wabash, etc. R. R. Co. v. Illinois*, 118 U. S. 557, 575, 7 Sup. Ct. 4, 30 L. Ed. 244.

" The nation and many states provide that carriers may not charge a higher rate for a short haul than for a long haul of like articles in the same direction under similar circumstances. But where the long haul is interstate, although the short haul is entirely within a single state, such a state may not enforce such a law for the same reason. *Louisville & Nashville R. Co. v. Eubank*, 184 U. S. 27, 42, 43, 22 Sup. Ct. 277, 46 L. Ed. 416.

" A state has the general power to prescribe the terms under which foreign corporations may carry on business within it, but any attempted exercise of that power by statute or otherwise in such a way as to prohibit or substantially to burden the interstate commerce of a foreign corporation within its borders is unconstitutional and void. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 27, 37, 30 Sup. Ct. 190, 54 L. Ed. 355; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 162, 30 Sup. Ct. 280, 54 L. Ed. 423; *Pullman Co. v. Kansas*, 216 U. S. 56, 65, 30 Sup. Ct. 232, 54 L. Ed. 378; *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1, 6-11, 12, 13, 84 C. C. A. 167, 172, 177."

Applying these principles to the facts disclosed

in the instant case, Judge SANBORN says at p. 772:

"On the other hand, the laws of a state or the orders of its commissions relating to its intrastate commerce which by their necessary or natural or probable operation have the effect substantially to burden interstate commerce, are beyond its powers, violative of the commercial clause of the Constitution, and void. * * *

"The acts of the Legislature of Minnesota and the orders of its commission are so general and so far reaching in their effect that there is no doubt that they unavoidably affect the interstate commerce of the companies. In the light of the rules and decisions reviewed, the question here at issue therefore becomes: Do these statutes and orders substantially burden or only incidentally or remotely affect the interstate commerce of the companies? This question, however, may not be answered by the words or terms of the laws and orders, or by a consideration of the intent or purpose of their makers alone. The touchstone to the true answer to the question and the test of the validity of the orders and statutes is their effect upon interstate commerce.

"It is the effect, and not the terms or pur-

power, of state regulation of its local commerce, that determines whether or not they so substantially burden interstate commerce that they violate the commercial clause of the Constitution. And this is a judicial question which each court must determine on its own responsibility on the special facts of each particular case, and in the determination and decision of which "it must obey the Constitution rather than the lawmaking department of the government." *Migler v. Kansas*, 123 U. S. 603, 661, 8 Sup. Ct. 273, 31 L. Ed. 205; *Henderson v. Mayor of New York*, 92 U. S. 259, 268, 23 L. Ed. 531; *Minnesota v. Barber*, 136 U. S. 310, 336, 10 Sup. Ct. 862, 34 L. Ed. 455; *Brannen v. Rehman*, 138 U. S. 78, 81, 11 Sup. Ct. 232, 34 L. Ed. 862; *Cleveland, etc. Ry. Co. v. Illinois*, 177 U. S. 524, 527, 20 Sup. Ct. 732, 44 L. Ed. 868; *Dunsmuir & Nashville R. R. Co. v. Echols*, 184 U. S. 27, 45, 22 Sup. Ct. 277, 46 L. Ed. 476; *Galveston, Harrisburg, etc. Ry. Co. v. Texas*, 220 U. S. 217, 227, 26 Sup. Ct. 628, 52 L. Ed. 1021; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 24, 27, 34, 39 Sup. Ct. 199, 31 L. Ed. 355; *Dunlap v. Western Union Telegraph Co.*, 216 U. S. 146, 160, 39 Sup. Ct. 260, 54 L. Ed. 423."

It was there contended, as here, that it is only when orders and statutes by their terms or by their construction substantially or directly regulate interstate commerce or disclose an intent so to do that they may be adjudged violative of the commerce clause. This contention cannot be sustained.

In support of these views Judge SANBORN cites *Colburn, Harrisburg etc. Ry. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1191, where the court said at page 217:

"Neither the state courts, nor the Legislature, by giving the tax a particular name, or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

To the like effect is the case of *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, where the court, speaking by Mr. Justice HARLAN, says at p. 27:

"But it is said that none of the authorities cited are pertinent to the present case, because the state expressly disclaims any

purpose by the statute in question to obstruct or embarrass interstate commerce, but seeks only to prevent the Telegraph Company from entering the field of domestic business in Kansas without its consent and without conforming to the requirements of its statute. But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction as the adjudged cases abundantly show."

Mr. Justice WHITE, in a concurring opinion in *Pullman v. Kansas*, 216 U. S. 56, says at p. 65:

"Even though a power exerted by a state, when inherently considered, may not in and

of itself abstractly impose a direct burden on interstate commerce, nevertheless such exertion of authority will be a direct burden on such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on. *Darnell v. Memphis*, 208 U. S. 113; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, and authorities there cited."

In *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 162, Mr. Justice HARLAN, speaking for the court, says at p. 162 :

"According to well-settled rules of statutory construction, the validity of a statute, whatever its language, must be determined by its effect or operation, as manifested by the natural and reasonable meaning of the words employed. *Henderson v. Mayor*, 92 U. S. 259, 268 (23 L. Ed. 543). If a statute by its necessary operation really and substantially burdens the interstate business of a foreign corporation seeking to do business in a state, or imposes a tax on its property outside of such state, then it is unconstitutional and void, although the state Legislature may not have intended to enact an invalid statute."

And so in the case at bar, while it may not have been the intention of the Railroad Commission by the order of September 21, 1910, made expressly applicable only to intrastate rates, to burden or affect directly or otherwise the interstate rates of the Southern Pacific Company as applicable to the same traffic, the necessary result of such order and the reduction required thereby as applied to the interstate commerce of the Southern Pacific Company is to burden and interfere with that commerce, and to destroy all interstate traffic in these commodities, unless the Southern Pacific Company submits to the reduction made and applies a corresponding reduction to all business of this class moving upon an interstate haul. It may not change the interstate rate to Portland as a basing point, whether the traffic moves by water or by competitive lines, or over its own rail lines, because the rates to Portland from other points outside of the State of Oregon are controlled by conditions over which the Southern Pacific Company has no control, and with basing rate makes the rate from other interstate points to Oregon line points south of Portland necessarily adding a proportional rate from Portland to Oregon line points on this

traffic that will enable the carrier to retain its interstate business and not discriminate against points beyond the state seeking to originate and move traffic to Oregon line points south of Portland. The necessary effect of the enforcement of this order made by the Railroad Commission is to compel the Southern Pacific Company and all other carriers engaged in interstate commerce, to reduce their interstate rates from points outside of the State of Oregon line points on the Southern Pacific, so as to equalize the basing rate into Portland with the local rate from Portland to Oregon line points, or else lose the business to Portland and to Portland jobbers.

The order is a regulation of interstate commerce and interferes with such interstate commerce not as a *matter of law*, but because as a *matter of fact* the effect of the order is as claimed.

The question here is whether or not the local rates upon this traffic moving from Portland to Oregon line points so affects the interstate rate on the same traffic and the interstate business of the Southern Pacific Company, as that the reduction made by the Railroad Commission upon this traffic makes the rate on the interstate

haul for the same traffic, or else compels the carrier to lose its interstate business.

The sufficiency of the complaint to present these questions cannot be doubted. Paragraph IX of the bill of complaint, (Record, pages 26 to 33) reads:

That the Union Pacific Railroad Company owns and operates a line of railroad extending from Union Pacific Transfer, in Council Bluffs, Iowa, to Granger in the State of Wyoming, and the Oregon Short Line Railroad Company owns and operates a line of railroad extending from Granger in the State of Wyoming to Huntington in the State of Oregon, and, extending from Union Pacific Transfer east to Chicago, and having physical connection with the line of the Union Pacific Railroad Company are various lines of railroad owned and operated by the Chicago & Northwestern Railroad Company, the Chicago, Rock Island & Pacific Railway Company and the Chicago, Milwaukee & St. Paul Railway Company. At Granger, Wyoming, there is a physical connection between the line of the Union Pacific Railroad Company and that of the Oregon Short Line Railroad Company, and at Huntington, Oregon, there is a physical connection between the line of the Oregon Short

Line Railroad Company and that of the Oregon Railroad & Navigation Company, which latter company handles interstate commerce into Portland and East Portland. That because of such physical connections and of the through tariffs published and established by the various companies parties thereto, merchandise and commodities of all kinds have moved from Chicago, Milwaukee, Duluth, St. Paul, Minneapolis, St. Louis and points and places located upon and east of the Missouri River, to Portland, in the State of Oregon. That the Northern Pacific Railway Company is a common carrier engaged in interstate commerce between Duluth and St. Paul, and Portland, Seattle and Tacoma, with physical rail connection into the City of Portland. That the Spokane, Portland & Seattle Railway Company, together with its connections with the Great Northern Railway Company at Spokane, Washington, has a physical, all-rail connection into Portland, and is engaged, with its connecting lines, in moving, under its published through tariffs, merchandise and commodities of all kinds, from Chicago, Milwaukee, Duluth, St. Paul, Minneapolis, St. Louis, and other eastern shipping points in other states of the United States, to Portland, Oregon.

That Southern Pacific Company, your orator, with its connecting carriers, is engaged in interstate commerce as a common carrier for hire, from New Orleans, La., Ogden, Utah, El Paso, Texas, Los Angeles, San Francisco, and other points in the State of California, with all-rail connection into the City of Portland, State of Oregon, at East Portland, and is engaged from time to time in moving, according to rates of through tariffs published and established by said company and its connecting lines, interstate commerce consisting of merchandise and commodities of all kinds, from these interstate points in other states than the State of Oregon, to Portland and East Portland, in said State of Oregon, and that all of said railroad companies having through published tariffs, so engaged in interstate commerce, are engaged in the movement of said interstate commerce not only to Portland and East Portland from all said points in said other states, but to all points on the lines of Southern Pacific Company in Oregon, applying to such shipment the local rates in effect and attempted to be modified by said pretended order hereinbefore set out. That all said interstate traffic handled by Southern Pacific Company, or subject to movement over its lines in Oregon, is ma-

terially affected by ocean competition on all traffic moving out of Los Angeles, and San Francisco, California, and other Bay points, in the State of California as well as interior points in the State of California, carrying a local rate sufficient to induce movement to ocean points, which said competition extends to transportation of interstate commerce from said points to Portland and East Portland, Oregon, and all points on the lines of Southern Pacific Company in Oregon, and that the reduction of said class rates so attempted to be effected by the said order directly and immediately affects the movement of all said interstate traffic.

That the tariffs filed with the Interstate Commerce Commission, as required by the said Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and the various amendments thereto and supplements thereof, and particularly said act of June 18, 1910, that prescribe the rates under which said interstate commerce is moved to Portland and East Portland and all points upon lines in Oregon of your orator Southern Pacific Company, are as follows :

Transcontinental Freight Bureau, West Bound, Tariff 4-H, I. C. C. 928, effective October 10, 1910.

Transcontinental Freight Bureau, East Bound, Tariff 2-H, I. C. C. 930, effective October 10, 1910.

Transcontinental Freight Bureau, Competitive Local and Joint Freight Tariff, West Bound, 5-F, I. C. C. 918, effective April 1, 1910.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 161, I. C. C. 3021, effective July 1, 1908.

Southern Pacific Company (Pacific System and Oregon Lines), Local Joint and Proportional Freight Tariff No. 162-B, I. C. C. No. 3367, effective September 11, 1910.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 418, I. C. C. No. 3090, effective January 1, 1909.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 203-A, I. C. C. No. 3209, effective July 6, 1909.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 576-A, I. C. C. No. 3313, effective January 23, 1910.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint

Freight Tariff No. 577, I. C. C. No. 3350, effective September 24, 1909.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 578-A, I. C. C. No. 3297, effective December 17, 1909.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 579, I. C. C. No. 3252, effective September 24, 1909.

Southern Pacific Company (Pacific System and Oregon Lines), Local and Joint Freight Tariff No. 580, I. C. C. No. 3253, effective September 24, 1909.

Southern Pacific Company (Pacific System and Oregon Lines), Local, Joint and Proportional Freight Tariff No. 464, I. C. C. No. 3339, effective June 12, 1910.

That Southern Pacific Company, Lines in Oregon, Local and Joint Freight Tariff No. 235-A, naming class and commodity rates for transportation of freight between Portland, East Portland, Portland (Jefferson Street), Oregon, and points on lines of Southern Pacific Company in Oregon, governed, except as otherwise provided in Tariff and as amended, by The Western Classification No. 47 (F. O. Becker, Agent, I. C. C. No. 5), supplements thereto and

reissues thereof, which said rates are attempted to be reduced by the Commission's order No. F-125, is duly filed with the Interstate Commerce Commission, bearing I. C. C. No. 3265, thereby prescribing the use of these said rates on all interstate traffic moving through Portland and destined to points on the Southern Pacific Company, Lines in Oregon, which said tariffs are duly filed with the Interstate Commerce Commission as required by law, together with tariffs on all interstate commerce moved by all transcontinental railroads aforesaid, moving into Portland and East Portland, Oregon, and carrying interstate traffic destined to points at Portland and East Portland, and on the lines of Southern Pacific Company in Oregon; all of which said tariffs so filed as aforesaid are required to be observed by law. And your orators pray that your Honors will take judicial notice of all said tariffs so filed with the Interstate Commerce Commission, as aforesaid, to which reference is here made as if the same were fully written herein or made a part of this bill of complaint by exhibit or otherwise, and which your orators cannot more fully set out in this bill of complaint without encumbering the record.

And your orators specifically allege and show that the tariffs listed, Southern Pacific Company (Pacific System, Lines in Oregon), Local and Joint Freight Tariffs, hereinbefore set out, show through class and commodity rates from a large number of shipping points in the State of California on the Line of Southern Pacific Company, to all points in Oregon on the lines of Southern Pacific Company in Oregon, which said rates are made up by using the ocean competitive rate from San Francisco and other Bay points, to Portland, adding thereto the local class rates out of Portland and East Portland to points on the lines of Southern Pacific Company in Oregon, and that any reduction of existing class rates, attempted as in said order of said Railroad Commission, hereinbefore set out, directly, immediately and materially affects, changes and alters the said rates on said interstate shipments, thereby reducing said interstate rates to the extent of the said attempted reduction of the said class rates so attempted to be ordered into effect by said order F-125. That the said order F-125, so attempted to be made as aforesaid, if put into effect, will materially and directly affect all interstate freight traffic of your orators or all other common carriers moving

traffic to Portland and East Portland, and to points on the line of Southern Pacific Company in Oregon, and therefore your orators further allege and show that to comply with the said order aforesaid, so attempted to be made by the said Railroad Commission, reducing class rates from Portland to points on the line of Southern Pacific Company in Oregon, would materially affect and reduce interstate rates.

And your orators would illustrate and specifically set forth and show that class rates from Portland south, covered by said order, are similar to existing rates on traffic originating beyond Portland, and form a portion of the through rates on said traffic having origin beyond the boundaries of the State of Oregon, and destined to points on Southern Pacific Company, Lines in Oregon, and that there is but one exception in the application of class rates from Northern California points north of Marysville, to Southern Oregon points, and with this exception, all traffic subject to application of class rates, originating in California south of Marysville, and in every other state of the United States, destined to points on the Southern Pacific Company, Lines in Oregon, is transported at through rates obtained by adding to the rate

applying to Portland, the class rate from Portland to destination.

Some of the tariffs filed with the Interstate Commerce Commission, applicable to said interstate business of your carriers, provide rates on traffic destined to points on the Southern Pacific Company, Lines in Oregon, specifically authorize the addition of class rates from Portland to destination, over established routes which do not require that the traffic be transported through Portland, namely:

Transcontinental Freight Bureau, West Bound, Tariff No. 4-H, I. C. C. No. 958, naming local and joint rates, governed (see exception 2, paragraph), by Western Classification No. 48 (I. C. C. No. 6 of E. O. Becker, Agent), supplements the provisions thereof, and Local, Joint and Proportional Commodity Rates from Eastern shipping points designated on pages 2 to 15 inclusive, to "North Pacific Coast Terminals" designated on page 16, and points in Oregon and Washington, designated on pages 17 to 22, and 23 to 28 inclusive, effective October 10, 1920, which tariff, on page 26, provides bases for through rates to points named along the Southern Pacific Company, Lines in Oregon, and bases for present class rates now in effect

as arbitraries to be added to the class or commodity rates applying to Portland, and also designates the gateways or routes over which the traffic shall move, to-wit:

"Will apply only via Gateways 32-A, 36, 41-A, 41-B, 41-C, 44 or 66, as shown on pages 30 to 34, inclusive," and the gateways referred to are as follows:

32-A. Northern Pacific Ry. to Wallula, Wash., Oregon Railroad & Navigation Co. to Portland, Ore., Southern Pacific Co. (Lines in Oregon) to destination.

36. Northern Pacific Ry. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

41-A. Union Pacific R. R., Granger, Wyo., Oregon Short Line R. R., Huntington, Ore., Oregon Railroad & Navigation Co., Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

41-B. Chicago, Rock Island & Pacific Ry. to Pullman, Colo., Union Pacific R. R., Granger, Wyo., Oregon Short Line R. R., Huntington, Ore., Oregon Railroad & Navigation Co. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

41-C. Chicago, Burlington & Quincy R. R., or Atchison, Topeka & Santa Fe. Ry. to

Denver, Colo., Union Pacific R. R., Granger, Wyo., Oregon Short Line R. R., Huntington, Ore., Oregon Railroad & Navigation Co. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

44. Union Pacific R. R., or Chicago, Burlington & Quincy R. R. to Denver, Colo., or Chicago, Rock Island & Pacific Ry. to Denver, Colorado Springs or Pueblo, Colo., in connection with Denver & Rio Grande R. R. to Salt Lake City, Utah, Oregon Short Line R. R. to Huntington, Ore., Oregon Railroad & Navigation Co. to Portland Ore., thence Southern Pacific Co. (Lines in Oregon) to destination,

or

Union Pacific R. R., or Chicago, Burlington & Quincy R. R. to Denver, Colo., or Chicago, Rock Island & Pacific Ry. to Denver, Colorado Springs or Pueblo, Colo., in connection with Colorado Midland Ry. and Denver & Rio Grande R. R. to Salt Lake City, Utah, Oregon Short Line R. R. to Huntington, Ore., Oregon Railroad & Navigation Co. to Portland, Ore., thence Southern Pacific Co. (Lines in Oregon) to destination.

66. Via El Paso, Tex., or Deming, N. M., or via Bakersfield, Fresno or Stockton, Cal.,

thence via Southern Pacific Co. (Pacific System and Lines in Oregon).

And it is also provided on page 26 of said tariff, as follows :

N. B.—(Applies only on traffic routed via Gateway 66 designated on page 34). When no specific through rate or specific method of making through rate, to intermediate points on line of Southern Pacific Co., named on pages 24 and 25, is provided, the rate to such intermediate points will be made by adding to the Terminal rate shown as applying to the points designated as "Terminals," viz.: Portland or East Portland, Ore., whichever is nearest point of destination of shipment, the local rate published for use upon Interstate traffic from such nearest "Terminal" point named to point of destination.

And therefore your orators allege and show that the through interstate rate from Eastern shipping points to points on Southern Pacific Company, Lines in Oregon, except as otherwise provided, are made by adding to the terminal rates shown as applying to the points designated as terminals, by way of Portland or East Portland, Oregon, the local rate published for use

upon interstate traffic, which said local rates are present class rates from such terminal points named, viz.: Portland and East Portland, to points of destination, and such interstate traffic may be transported from said Eastern points to destination by way of El Paso, Texas, or Deming, New Mexico, or via Bakersfield, Cal., Fresno, Cal., or Stockton, Cal., thence via Southern Pacific Company, Pacific System, Lines in Oregon, and as illustrating such movement, your orators show that the present through rates on syrup from New York City, New York, to Eugene, Oregon, are made by adding to the terminal rates shown in Transcontinental Freight Bureau, West Bound, Tariff No. 4-H, as aforesaid, namely, \$1.25 per 100 lbs. less than carloads, and \$0.85 per 100 lbs. carloads, the local class rates governed by Western Classification No. 48, from Portland or East Portland to Eugene, of \$0.36 per 100 lbs. less than carloads, and \$0.33 per 100 lbs. carloads, making through rates of \$1.61 per 100 lbs. less than carloads, and \$1.18 per 100 lbs. carloads. And shipments may move via any one of the routes designated as 32-A, 36, 41-A, 41-B, 41-C, 44, or 66. And your orators show and allege that the effect of

the said pretended order of the said Railroad Commission, F-125, if put into effect on the through interstate rate on syrup from New York to Eugene, would reduce the less than carload rate from \$1.61 per 100 lbs. to \$1.53 per 100 lbs., and reduce the carload rate from \$1.18 per 100 lbs. to \$1.08 per 100 lbs. by reducing the local rates published for use upon interstate traffic from Portland and East Portland to Eugene, from \$0.36 per 100 lbs. less than carloads, and \$0.33 per 100 lbs. carloads, to \$0.28 less than carload and \$0.23 per 100 lbs. carload, respectively.

And your orators would further show and allege by way of illustration of the effect of the said pretended order of said Railroad Commission, if allowed to go into effect as applied to interstate rates, that interstate traffic is moved under Southern Pacific Company (Pacific System, and Oregon Lines) Local, Joint and Proportional Freight Tariff No. 162-B, I. C. C. No. 3367, which names local, joint and proportional class and commodity rates between San Francisco, Oakland, Oakland Wharf, Stockton, San Jose, Marysville, Sacramento, and other points in California and Nevada on lines of Southern Pacific Company, Pacific System, and Portland,

Oregon, East Portland, and other points in Oregon on lines of Southern Pacific Company, which tariff was effective September 11, 1910, and on file with the Interstate Commerce Commission, which said tariff must be observed by your orators and their connecting carriers affected thereby, and is an interstate tariff naming through rates from San Francisco and points named, to points on Southern Pacific Company, Lines in Oregon, using competitive ocean rates to Portland and East Portland, plus class rates from Portland and East Portland to destination.

And your orators pray that the court will take judicial notice and knowledge of the said tariff last hereinabove described, as if the same were fully written herein and made a part of this bill of complaint.

And your orators allege and show that in the third column of said tariff is shown the basing rate to Portland, Ore. (Park St.) to be used only for basing purposes in conjunction with rates to points south of Portland (Park St.) Ore., shown on pages 60 to 64 inclusive, except as otherwise provided, and that the rates shown on pages 60 to 64 inclusive are present class rates from Portland, Oregon, to all points on Southern Pacific Company Lines in Oregon, except to points

competitive with Willamette River steamers, such as Salem, Independence, Albany and Corvallis. The class rates shown are one cent per 100 lbs. lower than regularly published class rates from Portland and East Portland, to Salem, Independence, Albany and Corvallis. And therefore, your orators show and allege, that taking the rates on syrup for example, the present rates from San Francisco to Eugene are \$0.71 per 100 lbs. less than carload, and \$0.44 $\frac{1}{4}$ per 100 lbs. carloads, which are made by combining on Portland, using the ocean rate San Francisco to Portland, plus the local class rates Portland to Eugene, and therefore your orators aver and allege that the effect of the Commission's order F-125 would be to reduce the less than carload rate on syrup from San Francisco to Eugene, from \$0.71 per 100 lbs. to \$0.63 per 100 lbs., and to reduce the carload rate on syrup from \$0.44 $\frac{1}{4}$ per 100 lbs. to \$0.34 $\frac{1}{4}$ per 100 lbs., a reduction in the carload rate of 23 per cent, notwithstanding that rail service involves a haul of 648 miles from San Francisco to Eugene.

Your orators would further show and allege that there is a Southern Pacific Company (Pacific System and Oregon Lines) Local Freight

Tariff No. 161, I. C. C. No. 3021, naming class rates for transportation of freight between San Francisco, Oakland, Stockton, San Jose, Niles, Sacramento and Marysville, Cal., also other points on lines of the Southern Pacific Company in California, as shown therein,—and Portland and East Portland and other points on lines of the Southern Pacific Company in Oregon, as shown therein, effective July 1st, 1908, which said tariff your orators pray that the court will take judicial knowledge and notice of, as if the same were fully written herein, and which said tariff contains the names of over 200 stations in California, from which direct through class rates apply to points on Southern Pacific Company, Lines in Oregon. All of which class rates, except as between Northern California and Southern Oregon points, are made by combining on San Francisco and Portland, using the low ocean rates between San Francisco and Portland to make the through rate from point of origin to point of destination, and that in addition to the interstate tariffs heretofore mentioned, your orators particularly show tariff called Southern Pacific Company (Pacific System and Oregon Lines) Local and Joint Freight Tariffs No. 577, I. C. C. No. 3250, effective September

24, 1909, naming rates for transportation of sugar from San Francisco, Oakland, San Jose, Sacramento, Stockton, and 200 other points in California on lines of Southern Pacific Company, to Portland, East Portland, Oregon, and other points in Oregon on lines of Southern Pacific Company, and that thereby also direct through rates are shown in this tariff from point of origin to point of destination, and are made by adding to the ocean rates from San Francisco to Portland, the class rates from Portland to destination.

Your orators also allege and show that there is a Southern Pacific Co. (Pacific System and Oregon Lines) Local and Joint Freight Tariff No. 578-A, I. C. C. No. 3297, effective September 17, 1909, naming rates for transportation of same from San Francisco, Oakland, San Jose, Stockton, Sacramento, and 200 other points in California on lines of Southern Pacific Company, to Portland, East Portland, Oregon, and other points in Oregon on lines of Southern Pacific Company, which said tariff is duly filed with the Interstate Commerce Commission, and of which your orators pray that the court may take judicial notice and knowledge, as if the same were fully written herein; and by which tariff direct through rates from point of origin to point of

destination are shown, which are likewise made by adding to the ocean rates from San Francisco to Portland, the class rates from Portland to destination.

Paragraph XV of the bill of complaint, (Record, Page 45) makes the following allegation :

"Said Railroad Commission Act is void and of no force and effect in this: that it violates Article I, Section 8, paragraph 3, of the Constitution of the United States, which provides: "Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and is violative of Article I, Section 18, of the Constitution of the United States, which provides: 'Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof,' and particularly in this: that the said act of the Legislative Assembly of the State of Oregon attempts to confer upon the Railroad Commission of Oregon jurisdiction over interstate commerce, and does not limit its power

and authority to commerce wholly within the State of Oregon; and particularly, further, in this, that the said Railroad Commission Act necessarily attempts to and does confer upon the said Railroad Commission authority and power to take into consideration, in determining and fixing any rate for the carriage of freight or passengers upon the lines of your orators within the State of Oregon, the earnings of the said complainants derived from interstate traffic.

"Said order so attempted to be made as aforesaid, on September 21, 1910, is void and of no force and effect, in this: that said order, if enforced, would violate Article I, Section 8, paragraph 3, of the Constitution of the United States, hereinbefore set out, and would violate Article I, Section 18, of the Constitution of the United States, hereinbefore set out, and would be in conflict with the Act of February 4, 1887, entitled, "An Act to regulate commerce," and the amendments thereto, and particularly the "Act to regulate commerce" as amended June 18, 1910, in this, that the said order directly, materially and substantially affects the rates upon practically all the interstate shipments of your orators."

Conceding these allegations to be true, as the demurrers do, the rates established by the order

of September 21, 1910, are clearly in violation of the Interstate Commerce clause of the Federal Constitution, and the Interstate Commerce Act.

II.

Since Congress conferred authority upon the Interstate Commerce Commission to determine and prescribe just and reasonable rates to be charged by common carriers engaged in interstate commerce, the power of the State under a State Railroad Commission Act to prescribe just and reasonable rates for intrastate commerce, is by necessary implication withdrawn, although Congress has expressly provided that the provisions of the amended Interstate Commerce Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one state, etc. That is to say, the exercise of the constitutional power of Congress to create a commission with authority to determine and prescribe just and reasonable rates to be charged upon interstate commerce by carrier *engaged in both kinds of commerce, at the same time, of necessity is inconsistent* with the continuance of the

power of the states to create combinations with power to determine and prescribe rates for commerce wholly within the state, upon the principle that the exercise of the rate-making power by two jurisdictions over the same instrumentality of commerce, is legally and necessarily incompatible. The interstate commerce carrier operates the property as a unit, in the movement of all its traffic, whether interstate or intrastate, and the earnings of that property are necessarily derived from the operation of the property as a unit. It is fundamental that the law of the states must yield to the acts of Congress passed in the execution of the power to regulate commerce conferred upon it by the Constitution.

N. Y., N. H. & H. Co. v. New York,
163 U. S. 625

Shaw v. Douglas, 22 Howard 297

Smith v. Alabama, 124 U. S. 479

Conally v. Union Sugar Ref. Co.,
184 U. S. 558

Jackson v. Massachusetts, 197 U. S.

25

Prising & Coal Co. v. Ohio, 26

577

Hopkins v. United States, 177 U. S.

94

Lantry Case, 188 U. S. 357

- Commons v. Slaughter*, 15 Petes, 449.
Passenger Cases, 7 Howard, 535.
Pennine Can. Mining Co. v. Pennsylvania, 125 U. S. 181.
Rossmore v. C. & N. W. Ry. Co., 125 U. S. 465.
Levy v. Hardin, 135 U. S. 119.
Robins v. Tax Dist. of Shelby County, 120 U. S. 489.
Chambers Ferry Co. v. Pennsylvania, 114 U. S. 196.
Livingston & C. Bridge Co. v. Kentucky, 151 U. S. 204.
Arthur v. Tennessee, 139 U. S. 375.
Mo. Kansas & Texas Ry. v. Haly, 169 U. S. 613.
Cutshall v. American Bridge Co., 113 U. S. 205.
Cutshall v. Nevada, 6 Wall. 35.
Gilbert v. Quinn, 9 Wheat. 1.
Calif. Cal. & Santa Fe Ry. v. Hilly, 158 U. S. 98.
Southern Railway Co. v. United States, 232 U. S. 20.

The cases we have cited under this point do not answer the third question under consideration. Even if determined by this court in *Cincinnati, New Orleans & Texas Pacific R. Co. v. Interstate Commerce Commission*, 182 U. S. 184, that

under the Interstate Commerce Act prior to the amendment of 1906, the Interstate Commerce Commission had no power to prescribe rates which should control in the future. This case was followed in *Interstate Commerce Commission v. Railway Company*, 167 U. S. 479, where the question was re-examined and the doctrine firmly established that the legislative power of prescribing rates, either maximum or minimum, or absolute, had not been conferred upon the Interstate Commerce Commission. This construction of the Interstate Commerce Act has been steadily followed by this court.

Interstate Commerce Commission v. Alabama etc. Ry. Co., 168 U. S. 144.

Interstate Commerce Commission v. Baird, 194 U. S. 25, 42.

Texas & Pacific R. Co. v. Oil Company, 204 U. S. 426.

Interstate Commerce Commission v. Chicago G. W. Ry., 209 U. S. 108.
Prentis v. Atlantic Coast Line, 211 U. S. 210, 226.

Honolulu R. T. Co. v. Hawaii, 211 U. S. 282, 291.

Siler v. Louisville & Nashville R. Co., 213 U. S. 175, 194.

The amendment of 1906 gave to the Commission express power to determine, after hearing on complaint, what are reasonable rates for the future, and to require the observance of such rates. (*Missouri, Kansas, etc. R. Co. v. I. C. C.*, 164 Fed. 645) Prior to the amendment of 1906, the Commission did not have the power to prescribe through routes and rates, and to compel connecting lines to enter into through traffic arrangements, although the Commission had power to pass upon the reasonableness of through rates. The Hepburn Act took effect June 29, 1906, and by Section 15 of that Act the Commission was given power to fix a reasonable maximum rate.

The "Act to Regulate Commerce" as amended June 1910, in unmistakable terms places carriers engaged in interstate commerce under the jurisdiction of the Interstate Commerce Commission, but expressly provides that the act does not apply to transportation wholly within one state. The power to prescribe just and reasonable rates and classifications to be observed as maximum charges is found in Section 15 of the Act of June 18, 1910, 36 Statutes at Large, 539-551.

It is respectfully submitted that the effect of these Acts of Congress as thus amended, is to

place all carriers engaged in interstate commerce under the jurisdiction of the Interstate Commerce Commission, in and so far as interstate rates are concerned, and to withdraw from the jurisdiction of the state commissions the power to prescribe rates for the movement of intrastate commerce, leaving *that* commerce to be affected as an incident to the commerce, that is within the jurisdiction of the Interstate Commerce Commission by the provisions of the Interstate Commerce Act. If Congress had by express statute, in the exercise of its power to regulate interstate commerce, authorized the Interstate Commerce Commission, as an incident to its general powers over interstate commerce, to prescribe just and reasonable maximum rates for domestic commerce, or for that commerce which moves wholly within a state, there is no reason why such exercise of power should not, upon principle, exclude the police power of the state in respect to the same commerce or traffic. When Congress therefore assumed to confer upon the Interstate Commerce Commission power to prescribe maximum rates for all interstate commerce *moved by a carrier engaged in that business*, and declared by the same statute that the power thus conferred should not cover or embrace domestic commerce, or commerce

moving wholly within a state, by necessary legislative intendment Congress declared in legal effect that, as the greater exceeds the less, the power to prescribe interstate rates for interstate commerce, should operate to withdraw from the states respectively, and should also exclude from the power of the Interstate Commerce Commission, the right to prescribe rates upon domestic or intrastate commerce.

The reasoning of the court in *Southern Railway v. United States*, *supra*, as applied to a car engaged in the movement of intrastate or domestic commerce, is persuasive of the power of Congress, under the commerce clause of the Constitution, to create a commission with full and exclusive jurisdiction over a common carrier engaged in interstate commerce, and using an instrumentality in the movement of that commerce even though that instrumentality be at the time moving purely domestic or intrastate commerce.

In order to sustain the power of the state commissions to prescribe reasonable maximum rates for traffic moving wholly within the state, over a road engaged in interstate commerce, and to determine whether or not such rates, as thus prescribed by a state commission, are confiscatory or are reasonable or unreasonable, the entire

traffic of the carrier, both state and interstate, including its entire earnings and the value of the plant or unit, necessarily must be considered; and, under the doctrine of *Smyth v. Ames*, 169 U. S. 466, the state commission, although having before it a unit of a particular value as such unit, is not permitted to base rates affecting purely state traffic, upon the earnings received from interstate traffic. The reasonableness or unreasonableness of rates thus prescribed by a state for the transportation of persons and property wholly within its limits, must be determined without reference to the interstate business done by the carrier, or to the profits derived from that business. It was there held that the state could not justify unreasonably low rates for domestic transportation, considered alone upon the ground that the carrier was earning large profits on its interstate business, over which, so far as the rates were concerned, the state had no control, and that the carrier could not justify unreasonably high rates on domestic business, upon the ground that it would be able only in that way to meet losses on its interstate business.

It is respectfully submitted that the conclusion arrived at by the court in *Smyth v. Ames*, *supra*, was the only logical conclusion that could be found in the situation as it then existed. At

that time Congress did not assume to exercise its power under the commerce clause of the Constitution, to give the rate-making power to the Interstate Commerce Commission, affecting this same unit of property, this same carrier engaged both in interstate and intrastate business. Under this doctrine it has become necessary to take a great interstate railroad, whose local rates in a state are under consideration or review, either before a state railroad commission, or in the courts, and after ascertaining by expert testimony the value of the entire property from which income is to be obtained, and which is devoted to both intra and interstate commerce, and apportion to capital account that portion of its plant which is theoretically supposed to be engaged in earning an income on its interstate business; and by the same process, ascertain the value of that portion of its plant which should be assigned to the capital account engaged in the movement of purely domestic commerce.

The report of Judge ORIS made to the United States Circuit Court for the District of Minnesota, in *Shepard v. Northern Pacific Railway Company et al.*, *supra*, describes the elaborate and intricate system under which the property of the railroads under consideration were divided into capital account so as to ascertain the proportion of the total

value of the property devoted to freight and passenger business, state and interstate. It became necessary in that case to ascertain the gross revenue from state and interstate business, both freight and passenger, separately stated; the relation of revenue per ton per mile, and per passenger per mile, respectively, state or interstate; the gross cost of operation, covering and being an aggregation of cost of state and interstate business, freight and passenger, and the division of cost between the freight and passenger business. Expert testimony was offered to show relative cost of the movement of interstate freight business as compared with the cost of movement of intrastate freight business. There was testimony in that case to the effect that it costs from three to seven times as much per ton per mile to do the intrastate freight business, as to do the interstate freight business, and that it costs from 25% to 50% per passenger per mile more to do the state passenger business, than to do the intrastate passenger business. The Master found from the weight of the testimony that the cost per ton per mile of doing state freight business was at least two and one-half times as much as was such cost in doing interstate freight business, in Minnesota, and that the testimony would have been ample to sustain a finding that

such relation of cost was as three to one. It then became necessary to divide the operating expenses, and to relate these operating expenses in a proper division between intrastate and interstate. An elaborate mathematical problem worked out the result. It was also necessary to make a division of total passenger operating expenses between intrastate passenger and interstate passenger; there was an apportionment of taxes to various classes of business, and there was an apportionment of other income to various classes of business, on the gross earnings basis; there was a net income applicable to return upon valuation of property, apportioned to the various classes of business, and an elaborate table was worked out upon the basis of earnings, operating expenses, miscellaneous income, and taxes, and a division of these operating expenses, between intrastate traffic and interstate traffic, both freight and passenger.

It is respectfully submitted that it is illogical and unsound to take a property which consists of a single unit, operating throughout a number of states, moving interstate traffic in the same train with intrastate traffic, both freight and passenger, using the same conductors, brakemen, engines, firemen, and other employees; using the same instrumentalities and appliances, and

then give to the Interstate Commerce Commission power to regulate rates, or to prescribe reasonable rates for all that traffic that moves from one state to another, and at the same time leave in the respective states power to prescribe reasonable rates for the movement of domestic commerce in the same train, moved by the same instrumentality and the same agencies, and the same employees. When the state alone exercised the rate-making power, through their commissions, it became a necessity to adopt the rule announced in *Smyth v. Ames*, *supra*, because the power of the state did not extend to the regulation of traffic that was interstate, or that was within the jurisdiction of Congress, under the commerce clause of the Constitution. There was no power of regulation of rates as to this proportion of the total business, in any other tribunal, at that time. Now, under the amended Interstate Commerce Act, Congress has assumed to control the rate-making power as to a large proportion of the business of every such carrier, and to assume exclusive control of the rate-making power as to all interstate commerce, both freight and passenger. Under these circumstances, how can it be said that the states may assume to take the same instrumentality, the same

capital invested in this great plant, and apportion, subdivide, and cut up the property into imaginary or approximately accurate proportions of capital invested, devoted to earning by its intrastate rates, a reasonable return upon such capital? It may be said that if this police power of the states is thus automatically withdrawn because Congress has exercised its power under the commerce clause of the Federal Constitution, to regulate interstate rates, there would be a vast body of traffic over which no tribunal would have control. This was true from the time of the enactment of the original Interstate Commerce Act of February 4, 1887, down to the passage of the Hepburn Act in 1906, as applicable to all interstate commerce. That is a mere question of expediency, not a question of power.

We therefore earnestly and strongly insist that the exercise by Congress of its constitutional power to regulate interstate commerce, and the creation of the Interstate Commerce Commission, with authority to prescribe maximum reasonable rates, excludes the power of the states as to an integral and inseparable part of the total commerce moved by these interstate carriers, and that purely domestic or intrastate

commerce is thereby withdrawn from the jurisdiction and control of the states.

In *Gibbons v. Ogden*, 9 Wheat, 1, the question was whether the legislation of the State of New York granting to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that state, with boats moved by fire or steam, for a term of years, was repugnant to the commerce clause of the Constitution; that is, whether the words, "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," comprehended navigation. It has been truly stated that "commerce" as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word in its application to foreign nations, it must carry this same meaning throughout the sentence, and remain a unit unless there is some plain, intelligible cause which alters it. The subject to which the power is next applied is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states cannot stop at the external boundary

line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and *which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary.* Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a state.

This is the language of the court on March 2, 1824, at a time when there was no amount of commerce of any kind by rail, and at a time when no railroad carried merchandise over a con-

tinuous line from one state to another, or as now-through many states, across a continent. Chief Justice MARSHALL says at p. 4 :

“ The subject to be regulated is commerce ; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”

It is, as it seems to us, a misapprehension of the true meaning of the word commerce in its relation to the nation, or to the people who comprise the nation, and who are engaged in commercial intercourse, to limit the term by the words “ interstate ” or “ intrastate,” or to attempt to modify its general character by state lines or words which would indicate that this com-

merce, consisting of a unit which is moved by a carrier over a continuous line operated throughout the states, and which may be co-extensive with the boundaries of the nation, should be subject to regulation by any political subdivision which might assume to prescribe rules for the movement of traffic by a carrier whose traffic was wholly domestic, and which had no relations, directly or indirectly, to the general movement of interstate commerce, if such a condition can be conceived under modern economic and commercial conditions. Commerce comprehends intercourse for the purposes of trade in any and all its terms, including the transportation, purchase, sale, and exchange of commodities between the citizens or subjects of other countries, and between the citizens of different states. *McNaughton v. McGirl*, 20 Mont., 124; 38 L. R. A., 367; 63 Am. State Rep., 610, citing *Wellton v. State of Missouri*, 91 U. S., 275, and *County of Mobile v. Kimball*, 102 U. S., 691. For a discussion of the meaning of the word "commerce," and for convenient reference, we cite the following cases :

State v. Schlitz Brewing Co., 104 Tenn., 715.

Fuller v. C. & N. W. Ry. Co., 31 Iowa, 187.

Passenger Cases, 7 Howard, 283.

Brennan v. Titusville, 153 U. S., 289.

C. & N. W. Ry. Co. v. Fuller, 17

Wall., 560.

Gloucester Ferry Co. v. Pennsylvania,

114 U. S., 196.

Pensacola Tel. Co. v. Western Union

Tel. Co., 96 U. S., 1.

In the case last cited Mr. Chief Justice WARRE, speaking for the court, says at p. 9:

"Since the case of *Gibbons v. Ogden* (9 Wheat., 1) it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat

to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

"The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. * * * Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile State legislation."

What is there said with reference to the electric telegraph, can be applied to the great inter-

state or transcontinental railways that today are the active instrumentalities in the movement of commerce of all kinds, making it possible for that close commercial intercourse between the individuals of the various states which was impossible prior to their construction. This great interstate highway thus engaged as an instrumentality in the movement of this commerce, and by Act of Congress expressly within its jurisdiction, ought not to be dismembered because in some of its trains there may be moved a volume of traffic or a portion of that commerce which is taken up and laid down wholly within the territorial boundary of a particular state. The commerce of the country is a single entity; it is for commercial purposes, and, for the purpose of control under the commerce clause of the Constitution, subject only to a single controlling agency, and is incapable of subdivision so as to be placed within the control of a multitude of separate jurisdictions, and especially where, as now, by the supreme law of the land the control of the major portion of what is technically called interstate commerce is specifically vested in a tribunal created by Congress.

In Southern Railway Co. v. United States, 222

U. S. 20, Mr. Justice VAN DEVANTER, speaking for the court, says :

"Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge ; both classes of traffic are at times carried in the same car and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both ; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains."

In determining the question whether the Safety Appliance Acts were within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but

embrace vehicles used in moving intrastate traffic, the court says :

“ The answer to this question depends upon another, which is,—is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement ? Or, stating it in another way,—is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate ? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regular intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported

therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce."

While this language is used with reference to an instrumentality owned by an intrastate railroad, but at the time moving an interstate car, it recognizes the unity of the business in which such carrier was engaged, and the unity of the instrumentality used in the movement of all traffic or commerce carried by the road. So in like manner, when Congress assumed the power under the commerce clause to control and prescribe, through its tribunal created for that purpose, reasonable maximum rates for which such traffic is to be moved, it necessarily excluded the power of the states to legislate as to any portion of that total commerce, although Congress itself did not grant to the commission any jurisdiction over purely internal or intrastate commerce. The exercise of the larger power is inconsistent with the exercise of the lesser power by any other tribunal than that created by Congress.

The traffic of any carrier engaged in interstate

commerce is not necessarily moved in one set of cars carrying only intrastate traffic, another set of cars carrying only interstate traffic. Even if the trains were so made up and operated as that only intrastate traffic moved in intrastate trains, and interstate traffic moved in interstate trains, this physical separation of the traffic would not destroy the unity of the commercial intercourse between the citizens of the United States, or the unity of the business of the carrier as a whole, or the entirety of the invested capital, or the single and indivisible enterprise in which that capital is invested, or the close and necessary relation of the total traffic of all kinds to each and every part of that traffic. All commerce is a unit in the industrial world, and the division into intra and interstate is purely geographical, and not economic, political, or commercial.

The earning power of a great interstate railroad depends upon the rates prescribed upon which the whole traffic moves, and the revenues go into a common fund to discharge operating expenses that are incurred as a whole, and to pay a reasonable return upon the entire investment as a complete and operated interstate highway. Let us illustrate the concrete case. A train of twenty freight cars is moved from Chicago to Portland, carrying merchandise upon

an interstate rate. This merchandise reaches Portland, carried over a single and continuous line, owned by a railroad company engaged in interstate commerce, and its line likewise extends through Portland to points south thereof, within the state. The rates from Portland south, to points within the state, are said to be within the jurisdiction of the State Railroad Commission, because the traffic has been picked up and laid down wholly within the territorial boundaries of the state. This train of twenty or more cars, if billed through from Chicago to Medford, Oregon, via Portland, moves interstate traffic, and the rates to be prescribed and the instrumentalities used are all within the jurisdiction of Congress. If the train stops at Portland, and makes delivery of its freight to the Portland jobber, the jurisdiction remains. If, however, the freight is rebilled, without unloading, and delivery to a siding is accepted by the consignee, and the freight is rebilled to Medford, the freight ceases to be interstate commerce, and thereby becomes domestic or local commerce, having regard to geographical lines, and having regard not to the nature of the commerce represented by the goods, but having regard to the place where the shipment originates, and where it ends. If the cars

are unloaded at Portland, warehoused in bulk or otherwise, or placed in a store and mingled with the goods of a local merchant, and these identical goods are shipped to Medford next day, in the same identical train, the goods become domestic or intrastate commerce, and the rates to be charged for the shipment come within the jurisdiction of the state. Is it possible for the freight charge upon the goods moved from Chicago, via Portland, to Medford, to be any more than the sum of the charge from Chicago to Portland and that from Portland to Medford, whether the charges respectively are made by the carrier or are made or prescribed by the State Railroad Commission, or by the Interstate Commerce Commission? If the charge is made less by the State Commission, from Portland to Medford, than the proportion of the total charge from Chicago to Medford, via Portland, must it not necessarily follow that the interstate rate from Chicago to Medford must be reduced, or else the carrier lose the traffic in favor of Portland, as against Chicago? Suppose the carrier, instead of having twenty or more cars in this train, all consigned from Chicago to Portland or Medford, respectively, should have half of these cars consigned to Portland, the other half to Medford, each carrying the same kind of merchandise,

and the first half are unloaded at Portland, and the merchandise enters into the channels of trade, burdened with a specific rate charged to Portland. The remaining ten cars are moved to Medford upon a through rate, which is greater than the rate from Chicago to Portland, with the local rate added on the same traffic, from Portland to Medford. The effect commercially would be that the merchandise unloaded from the first half of the train would move to Medford under the laws of commerce or trade, and competing with the same merchandise that had moved direct, and if the disparity of rates caused by state action was great enough to overcome the extra cost of handling the traffic thus unloaded at Portland, the commerce moving locally from Portland to Medford would exclude the traffic moving from Chicago to Medford direct. This is so, not because this total traffic, in the first instance, crossed state lines, and half of it came to rest at Portland, and acquired a situs for some state or local purpose, such as for the purpose of taxation, but because of the regulation of the state as to this identical article of general trade and commerce, these local rates would control the movement of the same article of commerce that otherwise would have moved under the jurisdic-

tion of the Interstate Commerce Commission, and such commerce did in fact move over the identical railroad from Chicago to Portland; and it was only because the interstate carriage into Portland, as to a portion of this traffic, that the state assumed to prescribe the rate for its further movement locally to Medford. The carrier thus affected either loses its business in part, or else delivers it under rates prescribed by separate and independent jurisdictions, each tribunal attempting to exercise power effective to reduce or increase the earnings of the entire road as a single property.

Rate regulation as to all the traffic of an interstate carrier can only be effective when exercised by one authority. How can the interstate railroad operating from New York to Portland, crossing many states, and subject to the jurisdiction of the Interstate Commerce Commission as to all traffic that moves physically from one state into other states, be at the same time subject to the jurisdiction of as many state railroad commissions as there are states across which this great highway is located and operated? How can the commerce or traffic moved by this interstate carrier—it may be in the same trains, that happens to be taken up and laid down

wholly within a state—be said to be so segregated and completely local in its character, as related to the property, and as related to the power to fix the rates, as to be within the jurisdiction of a state, after Congress has undertaken to prescribe the rates for all the remaining commerce moved, which is, as we may know, the larger or major portion of the great body of traffic that freely moves among our people. The rates made upon the traffic moved, whether such traffic be technically intrastate or interstate, fix the earning power of the property, and that earning power is not based upon each segregation of the mileage local to any one of these states. There can be no division or distribution of the power to make rates to be charged for the use of this entire property, without theoretical and possible actual dismemberment of a great highway into as many highways as are co-extensive with the territory over which the rate-making body has jurisdiction. Commerce knows no state lines. Whether the traffic moved is a carload of freight or a car full of people, each class of traffic, whether at the moment destined to a point beyond the state where the traffic originated, is a part of that great industrial and commercial traffic that moves according to economic laws, and

makes it possible for this great highway to be operated and maintained as a unit. The tax or burden placed upon that traffic, as the reasonable charge for its movement, when fixed by the rate-making power, must of necessity be determined and fixed either by the carrier or by the tribunal whose powers are co-extensive with the properties affected, and there cannot well be independent tribunals who may subdivide the property, segregate its values, and fix the earning power of an undivided and indivisible portion of the entire railroad, based upon a divided traffic, divided operating expenses and earnings, and at the same time another tribunal assuming to fix the earning power of that portion of this entire railroad devoted to traffic of another kind, dividing operating expenses and earnings upon some theoretical basis of relatively invested capital and related expense of operation, and net earnings as to that capital. The supreme and controlling power to prescribe rates and determine the earning power of the property, should be that tribunal whose jurisdiction is co-extensive with all the property, all the operating expenses, and all the earnings, as well as all the traffic, and when that tribunal is granted the power as to an indivisible portion of such

traffic, and such tribunal speaks under the warrant of the Constitution, it must follow that other tribunals having jurisdiction theretofore over some portion of the total traffic which may originate and be moved wholly within a state, must yield.

There is nothing revolutionary in this view, nor is there anything inconsistent with the great powers reserved to Congress by the Constitution, under the commerce clause. Whether Congress shall assume to prescribe the charge for commerce that is moved wholly within a state, by an interstate carrier, is a question of policy and not of power. When Congress assumed to exercise its supreme power over this great highway, as to the traffic technically known as interstate, it necessarily excluded the power of any other tribunal to fix or affect the earning power of the property as a whole.

Mr. Haines, in his work "*Restrictive Railway Legislation*," at page 20, says :

"The earliest charter for a railroad corporation seems to have been that of the Mohawk Valley Railroad Company, in 1825, but the earliest one for an interstate railroad was obtained by the Baltimore & Ohio Railroad Company from Maryland and Virginia,

in 1827 and 1828. The first charter granted by Massachusetts was that of the Boston & Lowell Railroad Company, in 1829."

Johnson in his work "*American Railway Transportation*," page 21, says:

"The pioneer American railroad built for general public use was the Baltimore and Ohio. The company was chartered in 1827 and construction was begun in 1828, but not on a large scale, there being only 13 miles open for traffic in 1830. Five years later the length of the road was 135 miles. The first rail of this historic road was laid on July 4, 1828, by Charles Carroll, the only living signer of the Declaration of Independence. As Professor Hadley, writing in 1885, stated: 'One man's life formed the connecting link between the political revolution of the last century and the industrial revolution of the present.'"

There were only 23 miles of railroad in the United States in 1830. There were 196,346 miles in 1900, and 239,052.28 miles in 1910. The Act of Congress on the 15th of June, 1866, 14 Statutes 66 was a recognition of the growth of the interstate railway, and may be well called "The Charter of the American Railway System." See

Railroad Co. vs. Richmond, 19 Wall., 584.
Union Pacific R. Co. vs. Chicago etc. R. Co., 163
 U. S. 589. *Bowman vs. C. & N. W. R. Co.*, 125
 U. S. 465.

All of this indicates the marvelous growth of the movement of commerce, and the extension of the agencies engaged in that movement under the control of the power of Congress.

While it was unnecessary to pass upon and decide this question in *ex parte Young*, 209 U. S. 123, Mr. Justice PECKHAM, in the course of the opinion in that case, speaking on this subject, says at p. 145 :

"Still another federal question is urged, growing out of the assertion that the laws are, by their necessary effect, an interference with and a regulation of interstate commerce, the grounds for which assertion it is not now necessary to enlarge upon. The question is not, at any rate, frivolous."

It will be noticed that the language there used had reference to the contention that the laws of the State of Minnesota, by their necessary effect interfered with and constituted a regulation of interstate commerce, while the contention made in the case at bar is that the order of September 21,

1910, necessarily and directly affects the interstate commerce of the complainants, and that the order in its practical operation became an effective and controlling regulation of interstate commerce and that the order was therefore void and not within the power or authority of the Oregon Railroad Commission.

It may be that in a case of this kind where, under a valid state law, intrastate rates are sought to be regulated and fixed by the state through its Commission or other administrative body, and where such order when made operates upon the interstate commerce of the carrier whose rates are thus affected so as to directly regulate and control such interstate rates and limit, regulate and control such interstate commerce of such carrier in such commodities, that under existing laws there is an apparent want of authority to regulate and determine or fix such intrastate rates.

It is clear that if there is a conflict between the assertion of power by the United States through the Interstate Commerce Commission and the power of the state through its Railroad Commission, the latter must yield, and it may be that existing legislation does not provide for a practical adjustment of rates thus affected.

Such was the situation in the case of *E. E. Saunders & Co. v. Southern Express Co.*, 18 I. C. C. Rep. 415.

Speaking upon this subject in that case, as applied to the particular facts, Harlan, Commissioner, says at p. 423 :

"By a readjustment of the state rates out of Mobile, whether so intended or not, the process of taking from Pensacola, through lower state-made transportation charges, what its superior zeal or its greater natural advantages have given to it has commenced and is now going on.

"The defendant is one concern and one instrument of commerce operating through and across those invisible lines that separate the several states from one another. It has but one corps of officers and employees and but one equipment. Its only object is to serve all the shippers in the territory through which it passes. That object is legitimately effected only when it serves its whole constituent public upon substantially similar terms when the conditions are substantially similar. If it voluntarily makes a distinction between traffic that moves from a point in one state to a point in another state and traffic that moves between points in the same state, and

gives to the state traffic lower rates than to the interstate traffic moving under substantially similar conditions it imposes upon the latter a burden that it ought not justly to bear, and it discriminates against one community in favor of another. The same burden and discrimination follow if instead of voluntarily so adjusting its rates it is compelled so to adjust them by the action of a state commission. It may be that this anomaly in transportation necessarily results from our dual system of government and that a remedy is beyond reach without some amendment to the national constitution. On principle it is clear that a carrier operating through two or more states is but one vehicle of commerce, and all traffic moved by it, whether state or interstate, ought, when the general transportation conditions are the same, to bear its just proportion of the cost of operation and ought to yield no more and no less than its just proportion of the revenues of the carrier. Any other theory is fundamentally inequitable, illogical and unreasonable. It may be, but on that point we express no opinion, that the Congress may constitutionally protect interstate commerce, as well as the carriers that are engaged in interstate transportation, by requiring that any state traffic

moved by such a carrier shall bear its just proportion of the cost of operation and yield its proper proportion of profit to the carrier; and that with such an end in view it may authorize this Commission to fix minimum rates, at least, for state traffic when moved by carriers engaged also in interstate transportation; or that it may provide that no carrier engaged in the interstate transportation of passengers or property may at the same time carry state traffic at rates that are less than the rates exacted by it for interstate carriage of like distance and under like transportation conditions. It has, however, not attempted any such legislation, and whether such an enactment would stand the test of scrutiny by the courts under the constitution as it now stands, and if so, whether it would be desirable from the standpoint of a broad public policy, are questions that must ultimately be determined by the legislative power and therefore cannot profitably be discussed by the Commission in this proceeding."

III.

The bill of complaint states facts sufficient to show that the order of September 21, 1910, if put into effect, would deprive the complainants of a just and fair return upon the value of their property. The complainants are entitled to enjoin any reduction in the earnings of these properties which would deprive them of a reasonable return or just compensation for the use of their properties, based upon their present values to be ascertained by competent proof. Any reduction which would deprive complainants of such reasonable return or just compensation is confiscation *pro tanto* and constitutes a taking of their properties without due process of law, in violation of the Fourteenth Amendment. The power to regulate and fix reasonable rates cannot be exercised so as to destroy all net earnings or so as to require railroad companies to serve the public without reasonable or any compensation.

Beale & Wyman, on Railroad Rate Regulations, sections 312, 351, 352, 382, 383, 384, 385, 386, 387, 388, 1331, 1332, 1333, 1334.

Smyth v. Ames, 169 U. S. 466; s. c. 171 U. S. 361, 365.

San Diego Land & Town Co. v. National City, 174 U. S. 739.

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362.

Chicago, Milwaukee etc. Ry. Co. v. Tompkins, 176 U. S. 167.

Minneapolis & St. L. Ry. Co. v. Minnesota, 186 U. S. 257.

San Diego Land & Town Co. v. Jasper, 189 U. S. 439.

Stanislaus County & San Joaquin, etc. Co., 192 U. S. 201.

Dow v. Beidelman, 125 U. S. 680.

St. L. & S. F. Ry. Co. v. Gill, 156 U. S. 649.

Covington & Lexington T. R. Co. v. Sanford, 164 U. S. 596.

Cotting v. Kansas City S. Y. Co., 183 U. S. 79.

Railroad Commission Cases, 116 U. S. 307.

Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339.

See also notes to Sections 1331, 1332, 1333, 1334 of *Beale & Wyman on Railroad Rate Regulation*.

City of Knoxville v. Knoxville Water Co., 212 U. S. 1.

Willcox v. Consolidated Gas Co., 212 U. S. 19.

- Ex parte Young*, 209 U. S. 123.
Hunter v. Wood, 209 U. S. 205.
Siler v. Louisville etc. Ry. Co., 213
 U. S. 175.
Chicago etc. Ry. Co. v. Minnesota,
 134 U. S. 418, 459.
In re Arkansas Railroad Rates, 163
 Fed. 141.
M. K. & T. Ry. Co. v. Love, 177
 Fed. 493.
Atchison, T. & S. F. Ry. Co. v.
Love, 174 Fed. 59.

The importance of the question involved may justify some reference to the fundamental rules which control the courts in cases of this kind.

The question for consideration is whether the bill of complaint states facts sufficient to show that the order of September 21, 1910, if put into effect, would deprive the complainants of a just and fair return upon the value of their property. If so, the demurrer, of course, should be overruled on this branch of the case.

The complainants are entitled to enjoin any reduction in the earnings of these properties which would deprive them of a reasonable return or just compensation for their use based upon their present values to be ascertained by competent proof, and the values stated in

the bill of complaint must be taken to be the true values of the property entitled to reasonable and fair return. Any reduction which would deprive the complainants of such reasonable return or just compensation would be confiscation to that extent and a taking of the properties without due process of law in violation of the Fourteenth Amendment.

Conceding the power to regulate and fix reasonable rates, it is charged that the enforcement of the rates promulgated by the order of September 21, 1910, would deprive the complainants of the return to which they are entitled. This power to regulate and fix reasonable rates cannot be so exercised as to destroy all net earnings or require railroad companies to serve the public without reasonable or just compensation.

A determination of this question does not necessarily involve the reasonableness of a particular rate or schedule, as a rate or schedule which, when taken with all the other earnings of the property leaves no return or any reasonable return, as stated by Beale & Wyman in their excellent work, *Railroad Rate Regulation*, Section 312:

"The carrier is entitled, first, to pay all expenses; which would include both the

actual expenses of operation and also certain annual charges that must be paid before any real profit can be realized. He is entitled furthermore to gain a fair profit on his capital invested. The determination of the actual amount of the capital invested may be a matter of some difficulty; once determined, the rate of profit upon that amount of capital is a question which will be determined, generally speaking, by the ordinary business profit of the time and place."

The bill of complaint alleges that the value of this property is \$43,594,886.73 (See Record, p. 3).

The bill of complaint shows that under existing tariffs, which are alleged to be reasonable, there has never been any sum realized from net earnings over and above the payment of fixed charges and operating expenses that could be distributed in payment of dividends upon the capital stock.

The bill of complaint shows that the fixed charges referred to are annual interest charged at five per cent per annum on an outstanding bond issue of \$17,745,000.00, leaving the balance of invested capital consisting of \$19,000,000.00 of capital stock and the sum of \$6,849,886.73 invested in addition thereto, making the total value of the property \$43,594,886.73. This is based

upon the total valuation stated in paragraph IV of the bill of complaint. If you take the valuation stated as representing the outstanding bonded indebtedness, deficit and capital stock, that sum is \$39,952,008.37, and the allegation is there made that the properties have never at any time yielded any net income applicable to the payment of dividends upon the capital stock or any part thereof. Assuming these allegations of fact to be true, as we must for the purposes of the demurrer, it then follows that a reduction of any sum under the order of September 21, 1910, could not be compelled and there is no question but that the reduction alleged to result from the enforcement of this order, on intrastate and interstate business, amounts to \$156,072.48 annually.

Beale & Wyman, further speaking upon this subject, say :

“ It must be borne in mind that the problem presented to a court which is asked to set aside an established rate as unconstitutional because it amounts to a confiscation of property is not precisely the same problem as that presented to a court which is asked to pass upon the fairness of a rate established by a railroad or other public service company. If a statutory rate takes

property, the property affected by it is not the original investment, but the property actually existent and owned by the company. If it is a taking of property to deprive the owner of a fair return upon it, the return must be unfair as income derived from that actual property. In determining whether the return allowed to the railroad is a fair return on their property, the property is that actually in use, at its present value. Where, however, the question is whether the company is exacting too great a return on its investment by means of an unfair schedule the question is as to the amount actually and *bona fide* invested. Justifying legislative rates therefore is one thing, and holding that unreasonable charges are not being made is quite another matter."

We may say that this language used by the learned authors concerns the power to set aside a statutory rate but the same principle underlies a suit to annul or set aside an order made by a Railroad Commission fixing charges which causes a reduction of net earnings upon the whole property when the net earnings as thus reduced do not permit the railroad company to receive a reasonable return on the value of the property devoted to the public service. In any such case the reasonableness of the rate set aside

and the reasonableness of the rate promulgated is only incidentally involved so far as the question of the reasonableness of such rate in and of itself is concerned. The inquiry into its reasonableness from the aspect under consideration is confined to the question whether the reduction thereby effected deprives the railroad company of a reasonable return when the entire earnings of the properties are considered. In the determination of that question all other rates and schedules in effect by the order are presumably reasonable, but in the case at bar the complaint alleges them to be reasonable, so that it follows that the reduction under consideration directly presents the question whether it is confiscatory. That is, whether it is depriving the railroad company of its right to a just and fair return upon its capital invested, and if it appears from the bill of complaint that the railroad company, even under the rates as they were before the order of September 21, 1910, went into effect, was not receiving and did not receive from all of its earnings anything out of which it could pay any return or dividend upon its capital stock, which in this case represents less than one-half of the value of the property, then a clear case of confiscation is stated under the authorities.

In *Smyth v. Ames*, 169 U. S. 466, Mr. Justice HARLAN, speaking for the court in an opinion to which there was no dissent, says, p. 522 :

"What amounts to deprivation of property without due process of law or what is a denial of the equal protection of the laws is often difficult to determine, especially where the question relates to the property of a quasi-public corporation and the extent to which it may be subjected to public control. But this court, speaking by Chief Justice WAITE, has said that, while a state has power to fix the charges by railroad Companies for the transportation of persons and property within its own jurisdiction, unless restrained by valid contract, or unless what is done amounts to a regulation of foreign or interstate commerce, such power is not without limit; and that 'under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law.' *Railroad Commission Cases*, 116 U. S. 307, 325, 331. This principle was recognized in *Dow v. Beidelman*, 125 U. S.

680, 689, and has been reaffirmed in other cases."

The court will recall that the case of *Smyth v. Ames* (169 U. S., 526) was a suit to set aside maximum freight rates prescribed by the statutes of the State of Nebraska, and the constitutionality of the statutes was directly involved and raised upon the facts stated, while in the case at bar the validity of the order of the Commission is involved and such order is directly attacked not because the Railroad Commission Act is invalid as to this branch of the case but because the order promulgates a set of rates and declares a reduction which would deprive the railroad company of earnings to which it is entitled to enable the railroad company to receive a just and fair return upon its property.

Speaking further upon this question, Mr. Justice HARLAN says at p. 526:

"In view of the adjudications these principles must be regarded as settled:

1. A railroad corporation is a person within the meaning of the Fourteenth Amendment declaring that no state shall deprive any person of property without due process of law, nor deny to any person

within its jurisdiction the equal protection of the laws.

2. A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.

3. While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

Smyth v. Ames, 169 U. S., 526.

While the complaint here makes no segregation of the portion of capital invested devoted to

intrastate traffic or the portion of capital invested devoted to interstate traffic, the presumption is that the rates for interstate traffic are reasonable, inasmuch as these rates have not been disturbed by the Interstate Commerce Commission. Therefore it is immaterial for the purposes of the demurrer to the bill of complaint what proportion of this capital is devoted to the one kind of traffic or to the other, provided it appears from the complaint that the property, as a whole, will be deprived by the order of the Commission of a just and reasonable return upon the property. The state cannot contend or claim that the interstate earnings are excessive and therefore that the earnings on intrastate business can be and should be reduced, for in the last analysis the rates for intrastate business and the rates for interstate business must both be reasonable and the confiscatory character of such rates must be determined with reference to the returns realized therefrom upon that portion of the capital devoted to intrastate business and to interstate business respectively.

Mr. Justice BREWER, speaking upon this subject, in *Smyth v. Ames*, *supra*, page 541, says:

"If we do not misapprehend counsel, their argument leads to the conclusion that

the State of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and prop-

erty between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business."

It may be claimed by counsel for the defendants that the bill of complaint in the case at bar should have alleged in specific terms the proportion of capital engaged in intrastate business and the proportion engaged in interstate business, but it is respectfully submitted that the state is in no position to make this contention for the reason that the bill shows that the rates on intrastate business now in effect are reasonable and are as low as the cost of the service will permit, and for the further reason that it appears that the interstate rates are filed with the Interstate Commerce Commission, and are therefore presumed to be reasonable, and if so, the state has no right to consider or determine whether or not the earnings resulting from the application of these interstate rates are excessive, and the state has no right to take a portion of such earnings and place them to the credit of intrastate business so as to enable

the state to justify a reduction of rates on intrastate business when the total earnings, both intrastate and interstate, freight and passenger, leave no net earnings out of which a just and fair return upon any part of the property can be obtained. If the proofs should develop the fact that the intrastate earnings of the complainants yield a net income over and above payment of operating expenses which would permit a surplus from which a just and fair return would be received for the use of that portion of the property engaged in intrastate business, it then might be claimed that the particular rates promulgated by the order of September 21, 1910, were not confiscatory, but that follows from the proofs when the segregation of capital and earnings is made.

Beale & Wyman on *Railroad Rate Regulation*, Section 1331, say :

"When a rate is fixed so low as to impair the earning power of the corporation and render it impossible to obtain a fair return upon its investment, the rate operates a confiscation of the property invested in the business, and is unconstitutional as depriving the company of its property without due process of law. As the rule is generally

expressed, an unreasonably low rate is an illegal rate, whether it is fixed by the legislature itself, or by a municipal corporation or board, or by a commission."

In *Covington and Lexington Turnpike Road Co. v. Sanford*, 164 U. S. 578, Mr. Justice HARLAN, speaking for the court, says at p. 591:

"We have then the case of a corporation invested by its charter with authority to construct and maintain a turnpike road, and to collect tolls 'agreeable' to certain named rates, and which is required by a subsequent legislative enactment to conform to a tariff of rates that is unjust and unreasonable, and prevents it, out of its receipts, from maintaining its road in proper condition for public use, or from earning any dividends whatever for stockholders. These facts are admitted by the demurrer. Is such legislation forbidden by the clause of the Constitution of the United States declaring that no state shall deprive any person of property without due process of law? We are of opinion that, taking, as we must do, the allegations of the answer to be true, this question must be answered in the affirmative.

"It is now settled that corporations are persons within the meaning of the consti-

tutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws. *Santa Clara County v. Southern Pacific Railway Co.*, 118 U. S. 394; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 189; *Minneapolis & St. Louis Railway v. Beckwith*, 129 U. S. 26; *Charlotte &c. Railroad v. Gibbes*, 142 U. S. 386, 391. And as declared in *St. Louis & San Francisco Railway v. Gill*, 156 U. S. 649, 657, upon the authority of previous decisions, 'there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws,'—citing *Railroad Commission Cases*, 116 U. S. 307, 331; *Dow v. Beidelman*, 125 U. S. 681; *Chicago, Milwaukee &c. Railway v. Minnesota*, 134 U. S. 418; *Chicago & Grand Trunk Railway v. Wellman*, 143 U. S. 339; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362."

In *St. Louis and San Francisco Railway Co. v. Gill*, 156 U. S. 649, 657, Mr. Justice SHIRAS, speaking for the court, says at p. 657 :

" This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws. *Railroad Commission Cases*, 116 U. S. 307, 331; *Dow v. Beidelman*, 125 U. S. 681; *Chicago, Milwaukee Etc. Railway Co. v. Minnesota*, 134 U. S. 418; *Chicago & Grand Trunk Ry. v. Wellman*, 143 U. S. 339; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S., 362."

In *San Diego Land Co v. National City*, 174 U. S. 739, Mr. Justice HARLAN, speaking for the court, says, 753 :

" It is equally clear that this power could not be exercised arbitrarily and without ref-

erence to what was just and reasonable as between the public and those who appropriated water and supplied it for general use; for the State cannot by any of its agencies, legislative, executive or judicial, withhold from the owners of private property just compensation for its use. That would be a deprivation of property without due process of law. *Chicago, Burlington, etc. Railroad v. Chicago*, 166 U. S. 226; *Smyth v. Ames*, 169 U. S. 466, 524. * * * In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an embarrassing one to a judicial tribunal, because it is primarily for the determination of the legislature or of some public agency designated by it. But when it is alleged that a state enactment invades or destroys rights secured by the Constitution of the United States a judicial question arises, and the courts, Federal and State, must meet the issue, taking care always not to entrench upon the authority belonging to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law.

"What elements are involved in the general inquiry as to the reasonableness of rates

established by law for the use of property by the public? This question received much consideration in *Smyth v. Ames*, above cited. That case, it is true, related to rates established by a statute of Nebraska for railroad companies doing business in that State. But the principles involved in such a case are applicable to the present case. It was there contended that a railroad company was entitled to exact such charges for transportation as would enable it at all times, not only to pay operating expenses, but to meet the interest regularly accruing upon all its outstanding obligations and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to all those ends would be a deprivation of property without due process of law, and a denial of the equal protection of the laws."

In *Chicago, Milwaukee, etc. Ry. Co. v. Tompkins*, 176 U. S. 167, Mr. Justice BREWER, speaking for the court, says at p. 173:

"Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine

and solve the questions involved. * * *

When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution. Railroad Commission cases, 116 U. S., 307; *Dow v. Beidelman*, 125 U. S. 680; *Georgia R. R. & Banking Co. v. Smith*, 128 U. S. 174; *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U. S. 418; *Chicago & Grand Trunk Ry. v. Wellman*, 143 U. S. 339; *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362; *St. Louis & San Francisco Ry. v. Gill*, 156 U. S. 649; *Covington etc. Turnpike Co. v. Sandford*, 164 U. S. 578; *Smyth v. Ames*, 169 U. S. 466."

The latest expression of this court upon this subject is found in *City of Knoxville*

v. Knoxville Water Company, 212 U. S. 1, and in *Willcox et al. v. Consolidated Gas Company*, 212 U. S. 19. Speaking of the general question, Mr. Justice MOODY, in *Knoxville v. Water Company*, *supra*, says at p. 18:

"The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislatures and subordinate bodies to whom the legislative power has been delegated, ought to do their part. Our social system rests largely upon the sanctity of private property, and that State or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer,

which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence. On the other hand, the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based. If hereafter it shall appear, under the actual operation of the ordinance, that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the courts of the United States or to the courts of the State of Tennessee."

In *Willcox v. Consolidated Gas Company* (212 U. S. 19), Mr. Justice PECKHAM, speaking for the court, says at p. 414 :

"The question arising is as to the validity of the acts limiting the rates for gas to the prices therein stated. The rule by which to determine the question is pretty well established in this court. The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and the

public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public. *San Diego Land Co. v. National City*, 174 U. S. 739, 757; *Same v. Jasper*, 189 U. S. 439, 442."

The precise question involved in the case at bar, upon a demurrer to the complaint, was ruled upon by the Circuit Court of Appeals for the Eighth Circuit, in *Wallace v. Arkansas Central R. Co.*, 118 Fed. 422, where, THAYER, Circuit Judge, speaking for the court, says at p. 424:

"It is obvious, we think, that no relief can be afforded to the appellants in this court, whether the action of the lower court upon the demurrer to the fifth and tenth paragraphs of the bill was erroneous or otherwise. Both the original and substituted bills contained a specific allegation that the tariff schedule which had been put in force by the commission, and made effective as of August 2, 1900, would reduce the complainant's earnings to such an extent as would amount to a taking of its property for public use without just compensation. It was averred in that paragraph of the bill that such would be the effect of the proposed schedule, because the income which the complainant was at the time deriving

from all sources, by the use of its property, was not sufficient, under the existing schedule of rates, to enable the company to pay its operating expenses, taxes, and fixed charges, and that the proposed schedule of rates would yield far less than the existing schedule. In view of the action taken by the defendants when their demurrer to the fifth and tenth paragraphs of the bill was overruled, these allegations stood confessed; and such being the case, the decree of the lower court was clearly right under repeated decisions of the supreme court of the United States holding that a state law or regulations establishing rates for the transportation of persons or property, such as will not admit of the carrier earning such a compensation as under all the circumstances of the case is just to it and to the public, operates to deprive the company of its property without due process of law, and to deny to it the equal protection of the law, in violation of the fourteenth amendment to the federal constitution. *Smyth v. Ames* 159 U. S. 466, 522, 523, 18 Sup. Ct. 418, 42 L. Ed. 819; *Reagan v. Trust Co.* 154 U. S. 362, 14 Sup. Ct. 418, 1047, 38 L. Ed. 1014."

In *Missouri, K. & T. R. Co. v. Interstate C. Commission*, 163 Fed. 645, the Circuit Court,

consisting of Judges VAN DEVANTER, HOOK, and ADAMS, upon an application for a preliminary injunction, say 647 :

"Neither Congress nor any legislative or administrative board acting by its authorization can competently establish rates for the transportation of property in interstate commerce that will not admit of the carrier earning such compensation for the service rendered as under all the circumstances is just and reasonable to it and to the public, for that would be depriving the carrier of its property without due process of law, and would be taking its property for public use without just compensation, in violation of the fifth amendment to the Constitution."

While what is there said concerned the operation of rates prescribed by the Interstate Commerce Commission, the rule is equally applicable to rates promulgated by a state railroad commission, in so far as the question of confiscation is concerned.

In the case of *Missouri, K. & T. R. Co. v. Love*, 177 Fed. 493, the judgment of the court was invoked by an application for a temporary injunction, and the defendants showed cause by

demurrers to the bills of complaint. It was urged in that case that the bills of complaint were defective because they did not assail the freight rates separately, but the court there said that the bills disclosed the contrary, at least by express general allegations. The suit involved the validity of the two-cent per mile passenger rate prescribed by the Constitution of Oklahoma, and certain freight rates prescribed by the Corporation Commission of that state. Speaking upon the general subject, HOOK, Circuit Judge, says at p. 502 :

"The demurrers: It is argued that the freight and passenger rates are still in legislative process, and therefore within the doctrine of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, not properly the subject of judicial consideration. Both phases of this contention have already been considered in connection with the pleas. 174 Fed. 59. It is the law of the land that a state may not confine to its own courts a citizen who claims his rights under the Constitution of the United States have been denied. And the Supreme Court did not hold in the *Prentis Case* that a similar result could be accomplished by prescribing and enforcing

under penalties a legislative rule, even though tentative, and restricting the remedy of the citizen to subsequent legislative inquiry and action.

"It is also urged that the bills of complaint are defective because they do not assail the freight rates separately. But the bills disclose the contrary, at least by express general allegations. Moreover, the rates in question should properly be considered as a body and in connection with the other freight rates of the companies not affected by the orders. Though the orders, save three modifications, were made successively, at different times during the year 1908, the rates prescribed constitute as much a single body as if embraced in one order. They affect from 40 to 50 per cent. of the local freight business, and cause an average reduction of about 40 per cent. of the prior rates applied to the same amount of traffic. Presumably the Commission preserved a due relation among them so far as is practicable in such cases, and there is no contention that the rates left untouched are relatively as low. When all the local freight earnings are considered an insufficient net return is clearly disclosed, and there is no difficulty in locating the cause."

It does not appear whether the demurrers were overruled or not, but upon the proofs, temporary injunctions were granted.

In *Southern Pacific Company v. Interstate Commerce Commission*, 177 Fed. 963, ROSS, Circuit Judge, speaking for the Circuit Court, consisting of Judges GILBERT, ROSS, and MORROW, sitting *en banc*, says at p. 964:

"It is well established law that the fixing of the rates to be charged by public service corporations is a legislative function, from which it necessarily follows that when Congress, as it did, conferred upon the Interstate Commerce Commission the power, in causes properly brought before it, to determine what are and should be reasonable rates to be charged by the carriers of interstate commerce, its action in the premises is conclusive upon the courts, subject of course always to the inhibitions of the Constitution of the United States, which protect such companies, like everybody else, against confiscatory rates."

What is there said, of course, must be considered in connection with the questions we shall presently discuss, that is, whether the Federal Court, in equity, can review a rate made by a railroad commission, to determine whether the

rate in and of itself is reasonable or unreasonable, where the state statute authorizes a judicial review, or whether a Federal Court in equity is limited to a judicial review that will merely inquire whether or not the rates reduced, in connection with the existing body of rates, are so unreasonably low as to allow insufficient net earnings out of which the railroad company should receive a just and reasonable return upon its property. We shall presently show, when that question is reached, that a Federal Court in equity must not only determine whether the reduction is confiscatory, and therefore unreasonable, but whether or not the rates promulgated are in and of themselves unreasonably low.

In *Portland Railway Light & Power Co. v. Railroad Commission of Oregon*, 109 Pac. 273, Ore., Mr. Justice SLATER, speaking for the court, says at p. 274 :

"The several principles of law stated in the argument are undoubtedly sound, and not to be questioned, but in applying the reasons of the law to the facts of the case, we fail to fully agree with counsel. The principles are that a corporation is a person within the meaning of the fourteenth amend-

ment, which forbids the state to deny to any person within its jurisdiction the equal protection of the laws, and prohibits the taking of property without due process of law; that the fixing and enforcement by a railroad commission of unjust and unreasonable rates for transportation by railroad companies is an unconstitutional denial of the equal protection of the laws; that a corporation cannot be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it; and that the requirements of the fourteenth amendment apply both to privileges conferred and liabilities imposed, and no greater burdens should be imposed upon one than are laid upon others in the same calling and condition."

In *State v. Central Vermont Ry. Co.*, 81 Vt., 463, Mr. Justice TYLER, speaking for the court, says at p. 466:

"It is equally well settled that it is within the power of a state legislature, with reference to commerce within the state, and of Congress, with reference to interstate commerce, to prescribe the rates to be charged by public carriers for their services, so long as the charges fixed do not require that the services rendered shall be without reasona-

ble compensation. *Smyth v. Ames*, 169 U. S., 466, 42 L. Ed., 819. But it is held that, though the power of the Legislature to prescribe the charges of a railroad company is beyond question, it is not an unlimited power. It is not a power to destroy or to compel the doing of a service without reward, or to take private property for public use without just compensation or without due process of law. *Budd v. New York*, 143 U. S., 517, 36 L. Ed., 247. See numerous cases cited in the opinion in *Smyth v. Ames*, 169 U. S., 523, 525, 42 L. Ed., 841; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S., 174, 32 L. Ed., 377; *Cleveland C. C. & St. L. R. Co. v. Closser*, (Ind.) 9 L. R. A., 754; *Louisville & N. R. Co. v. Com.*, 99 Ky., 132, 33 L. R. A., 209."

The bill of complaint shows that the receipts from all sources for the eight years ending June 30, 1909, were \$42,578,133.33 and the disbursements for the same time were \$41,389,493.35, leaving as net to apply on outstanding deficit for losses from operations previously sustained, only the sum of \$1,188,639.98. It does not clearly appear, perhaps, from the pleadings whether the annual bond interest, on the \$17,745,000 of outstanding bonds, was or is included in the total disbursements, or whether

the sums paid as annual taxes were so included, but construing the complaint more strongly against the pleader, and therefore, assuming that these annual sums were so included, the fact remains that on June 30, 1909, there was a deficit from operation, after applying all receipts, of \$3,207,008.37 and that, during the whole period of the lease from July 1, 1887, to date, there was no sum earned available for dividends upon the stock, representing a value of \$19,000,000, or disregarding the stock as such, no actual return, on the capital invested, other than that portion of the total \$39,952,008.27 book value, or total of \$43,594,886.73 actual value, admitted as alleged—other than annual interest on \$17,745,000 thereof at 5 per cent, that is to say, the demurrer admits that complainants have \$22,207,008.27 upon one basis, or \$25,849,886.73 on the other basis, invested in the property, that for eight years has not earned any income. The excess of net earnings for any one year, even if shown to exist, cannot be used as a shield to protect the Commission from this confiscatory order.

Under the doctrine of *Knoxville v. Water Co.* and *Willcox v. Consolidated Gas Co.*, *supra*, the complainants are entitled to a just and reason-

able return upon their properties, and what is such return, is a question of fact, but it is fundamental that a Railroad Company is entitled to the same compensation for the use of its property and exactly the same return, as may be enjoyed by any other private property, based, of course, as a minimum upon the general return allowable to and earned by other property and business, in the country or locality served. In *Willcox v. Consolidated Gas Co.*, such return was not confiscatory, with a minimum of 6 per cent net. In *Shepard v. N. P. Railway Co.*, 184 Fed. 765-807, the return fixed as a minimum was 7 per cent. Any body of rates yielding a less return than 7 per cent upon railroad capital, taking into account the general situation and hazards, would be confiscatory. What is confiscation, is easily ascertained by this rule. Rates may remain reasonable with a much greater return than the minimum, but any reduction, compelled by the state which deprives the railroad company of the minimum net return—not upon bonded debt or stock—but upon the value of the entire investment—would be and is confiscation. Complainants are, therefore, entitled to a net return of not less than 7 per cent

upon \$43,594,886.73 or upon \$39,952,008.27 as the actual value may be found to be. It is thus seen that the order made, if enforced, is clearly confiscatory.

The averments of the bill of complaint intending to challenge the reasonableness of the particular schedule of rates promulgated by the order of September 21, 1910, are full and are sufficient to tender an issue of fact thereon.

That the rates promulgated are based upon the arbitrary approval of Class 1 now in effect and that the lower rates are made by an arbitrary spread between the class rates, coupled with the averment that the classification and spread and each thereof was so made and adopted arbitrarily and without any reference to the distance such traffic should be moved or the character of the traffic or the service to be performed or the compensation that should be paid therefor, raises a distinct issue of fact which challenges not only the reasonableness of the rates promulgated but the classification or relative rates between classes, and the demurrer therefore admits that the classification is capricious and not based upon any fair consideration.

It is also alleged in connection therewith that the largest decrease in these class rates in the

application of the arbitrary percentage takes place in Classes 4 and 5, and that under these classes groceries and hardware are largely moved, and that the decrease approximates twenty per cent of existing rates, and that this decrease will be largely of benefit to jobbers and dealers, who have made and are now making excessive profits under the existing class rates. No citation of authority is necessary to sustain the contention that such a rate based upon such a classification cannot be said to be reasonable.

IV.

The bill of complaint charges in specific, direct and apt terms that the rates promulgated by the order of September 21, 1910, are unreasonable and that the rates of the complainant, Southern Pacific Company, displaced by the Commission, as well as all other rates in effect at the date of the order, were and are reasonable, and that the particular rates displaced yielded but slight compensation above the cost of the service. (See paragraph X, pages 33-37 Record. See also subdivision "k" paragraph XV, page 46

Record. See paragraph XI, pages 37-39 Record, showing competitive conditions.)

What specific rate or schedule of rates shall be promulgated by a Commission or other rate making body or regulating tribunal effective in the future, is an administrative function. Whether such rate or schedule of rates is reasonable, in fact, is a judicial question—under general principles of law as well as under the express provisions of Sections 31, 32, 33, 34, and 35 of the Railroad Commission Act of February 18, 1907, being Sections 6909, 6910, 6911, 6912, 6913, Lord's Oregon Laws.

Shepard v. N. P. Ry. Co., 184 Fed. 765, 807;

Louisville & N. Ry. Co. v. I. C. C., 184 Fed. 118;

I. C. C. v. L. & N. Ry. Co., 190 U. S. 273;

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426;

Prentiss v. Atlantic Coast Line, 211 U. S. 210;

I. C. C. v. N. P. Ry. Co., 216 U. S. 538;

I. C. C. v. Delaware, L. & W. R. Co., 216 U. S. 531;

- I. C. C. v. Ill. Cen. R. Co.*, 215 U. S.
452;
Missouri, Kansas & Texas R. Co. v.
I. C. C., 164 Fed. 645, 648;
Beale & Wyman on Railroad Rate
Regulations, Sections 315, 317,
318, 319, 320, 321, 322, 323, 324,
325, 459, 460, 515, 517, 518, 519,
523, 524, 525, 526, 527, 528, 530,
531, 533, 534, 914, 915, 917, 918,
919, 920, 924, 925, 926, 927, 928,
932, and cases cited in the foot
notes to each of these sections;
McGrew v. Railroad Co., 230 Mo.
496, 531;
Chicago, etc., R. Co. v. Minnesota,
134 U. S. 418;
Chicago, etc., R. Co. v. Wellman, 143
U. S. 339;
Reagan v. Trust Co., 154 U. S. 362;
St. Louis, etc., R. Co. v. Gill, 156
U. S. 649;
Covington T. P. Co. v. Sandford, 164
U. S. 578;
Smyth v. Ames, 169 U. S. 466;
San Diego Land Co. v. National City,
174 U. S. 739;
Colting v. Stock Yards Co., 183 U. S.
79;
Stanislaus County v. San Joaquin
County, 192 U. S. 201;

- Ex parte Young*, 209 U. S. 123 ;
Knoxville v. Knoxville Water Co.,
 212 U. S. 1 ;
Willcox v. Consolidated Gas Co., 212
 U. S. 19 ;
*Mo. K. & T. R. Co. v. Interstate
 Commerce Com.*, 164 Fed. 645 ;
*Chicago, M., etc., Ry. Co. v. Tomp-
 kins*, 176 U. S. 167 ;
Mo. K. & T. Ry. Co. v. Love, 177
 Fed. 493 ;
*Interstate Commerce Commission v.
 Chicago Ry. Co.*, 218 U. S. 88, 110 ;
Prentiss v. Atlantic Coast Line, 211
 U. S. 210, 224 ;
*Central of Georgia Ry. Co. v. Rail-
 road Commission*, 161 Fed. 925,
 964 ;
Louisville & N. R. Co. v. Brown,
 123 Fed. 946, 948 ;
*Interstate Commerce Commission v.
 Cincinnati, etc., Co.*, 167 U. S. 499 ;
*Southern Pacific Co. v. Board of
 Railroad Commissioners*, 78 Fed.
 236 ;
*Interstate Commerce Commission v.
 Chicago, G. W. Ry. Co.*, 141 Fed.
 1003 ;
*N. P. Ry. Co. v. Railroad Commis-
 sion of Washington*, 106 Pac. 611 ;

- Southern Ry. Co. v. Atlanta Stove Works*, 128 Ga. 207;
- Railroad Commission v. Houston & Texas Central Ry. Co.*, 90 Tex. 340.
- Pecple v. Willcox*, 194 N. Y. 383;
- Matter of Village of Saratoga Springs v. Saratoga Gas etc., Co.*, 191 N. Y. 123;
- M. St. P., etc., Co. v. Railroad Commission*, 136 Wis. 146;
- The State v. Railway Co.*, 76 Kan., 467;
- Mich. Cen. Ry. Co. v. Railroad Commission*, 160 Mich. 355;
- Mich. Cen. Ry. Co. v. Circuit Judge*, 156 Mich. 459, 470;
- Chicago B. & Q. R. Co. v. Jones*, 149 Ill. 361;
- Janvrin, petitioner*, 174 Mass. 514, 517;
- Commonwealth v. Atlantic Coast Line Ry. Co.*, 106 Va. 61.
- Interstate Commerce Commission v. Baltimore & Ohio Ry. Co.*, 43 Fed. 37;
- Ill. Cen. R. Co. v. Interstate Commerce Com.*, 206 U. S. 441.

V.

In addition to the allegation made in the bill of complaint that the rates promulgated by the order of September 21, 1910, are unreasonable, it is charged specifically that the order is void in that the reduction made thereby is based upon the arbitrary approval of Class 1, now in effect, and an arbitrary spread between the class rates, adopting the arbitraries of 100 per cent. for the first class, 85 per cent. of first class for second class, 70 per cent. of first class for third class, 60 per cent. of first class for fourth class, 50 per cent. of first class for fifth class, 50 per cent. of first class for Class A, 40 per cent. of first class for Class B, 30 per cent. of first class for Class C, 25 per cent. of first class for Class D, and 20 per cent. of first class for Class E, and that this arbitrary classification and spread, and each thereof, was so adopted by the Railroad Commission arbitrarily and without any reference to the distance such traffic should be moved, or the character or nature of the traffic, or the service to be performed, or the compensation that should be paid therefor, and that the classification is capricious and not based upon any fair consideration, and that under this arbitrary spread or

application of percentage of class rates, the largest reduction is effective at points on the line more difficult and expensive to operate by reason of mountain chains and physical difficulties (See sub. "k", Par. XV, Record, page 46). In this respect and to show the unreasonable character of the order in this respect, it is alleged that the largest decrease in these class rates affects Classes 4 and 5, and that under these classes, consisting of staples, groceries, and hardware particularly are moved largely, both intrastate and interstate, and that the decrease as to such commodities, under such classification attempted to be made by the order, approximates 20 per cent. of existing rates, and that this decrease will be largely if not wholly of benefit only to jobbers and dealers therein, and that said dealers and jobbers, during several years last past, have made and are now making large and excessive profits under existing class rates, and that this order if put into effect will still further increase these profits at the expense of complainants and of the public (See Par. X, p. 33-37 Record).

It is further alleged that existing local class rates supplanted by this order are reasonable

and just, and made as low as competitive conditions intrastate and interstate will permit or allow, and that the compensation charged is reasonable and just and affords but slight compensation above the cost of service, and that the decrease in revenues made by this order will, furthermore, have to be made up by increasing other rates upon traffic not affected by the order, particularly products of the soil, forest, and farm, many of which receive and enjoy terminal rates, including such commodities sold and consumed in the markets of the world, thereby compelling complainants to discriminate against these products, to the injury of complainants and to the public (See Par. X, p. 33-37 Record).

It therefore necessarily appears from these allegations that the reduction promulgated by the order of September 21, 1910, results from the arbitrary classification and spread made, and that this was so made without reference to the distance the traffic be moved, the nature or character of the traffic, service performed, or compensation that should be paid therefor, and that the classification is not only capricious, but is not based upon any fair consideration. Assuming that these allegations of fact are true, the

order is necessarily void, and the rates promulgated thereby cannot stand.

Interstate Commerce Commission v.

Chicago etc. Co., 141 Fed. 1003.

Southern Pacific Co. v. Bartine, 170

Fed. 725, 742.

Chicago etc. R. Co. v. Iowa, 94 U. S.

155.

VI.

When a railroad corporation is chartered by a State, with the right to engage in the transportation of passengers and freight, and to collect and receive such rates therefor, as it may prescribe, the right to charge a reasonable rate or compensation, for the use of its property for such purpose by the public, is implied, and forms a part of its contract with the state, which cannot be impaired by legislation.

Section 21, Article I, of the Constitution of the State of Oregon.

Section 2, Article I, of the Constitution of the State of Oregon.

Section 10, Article I, of the Constitution of the United States.

Section 34, Act of the Legislature of Oregon, October 14, 1862.

Miller v. State, 15 Wall. 478.

C. B. & Q. R. Co. v. Iowa, 94 U. S.
155.

Shields v. Ohio, 95 U. S. 319.

Wells-Fargo Co. v. O. R. & N. Co.,
15 Fed. 561.

Ex parte Koehler, 23 Fed. 529.

Cleveland Gas L. & Coke Co. v.
City of Cleveland, 71 Fed. 610.

Ball v. Rutland Ry. Co., 93 Fed. 513.

Southern Indiana R. Co. v. R. R.
Com., 172 Ind. 113.

Stone v. Y. & M. V. R. Co., 62
Miss. 607.

Pingree v. Michigan Cent. R. Co.,
118 Mich. 314.

State v. S. P. Co., 23 Or. 424.

In the case of *Cleveland Gaslight & Coke Co. v. City of Cleveland*, 71 Fed. 610, JACKSON, Circuit Judge, said, at page 610 :

" In February, 1846, the legislature of Ohio, under constitutional authority, chartered the Cleveland Gaslight & Coke Company, with power and authority, the privilege, as we call it, to manufacture and sell gas within the city limits of Cleveland. It did provide, as all this class of legislation usually provides, that, before entering upon the streets of the city that were under the

control of the municipality for the purpose of laying down its pipes, its mains, and so on, it must get permission of the city. The city in due time gave its permission, and, having given its permission, and the company having laid down its pipes, the city, under well-established authorities, could not withdraw its consent. It becomes a fixed and vested right, under the terms and provisions of the charter, to manufacture and vend gas within the city limits of the city of Cleveland. That is clear, beyond a question. The constitution and laws of Ohio at that time reserved no power, either to repeal that charter or modify or alter or to change it in any respect. By the terms of the charter, there is necessarily imported in the right of the company, or necessarily implied, the right to charge a reasonable rate for all gas furnished, just as though that right had been expressed in the most positive terms in the charter itself. We read in that charter, therefore, the right inferred to make a reasonable charge for what it supplied to the city and the inhabitants of the city of Cleveland. There is no power in the aggregated sovereignty of Ohio to deal thereafter with that charter. The state had no power to deal with it, to abridge, curtail, or limit its powers, or to deprive it

of its franchises after it had accepted its charter and laid down its pipes. Neither the city nor the state itself, in its sovereignty, had any power thereafter to modify, change, or alter that charter right of the gas company. The constitution of 1851 was as invalid to affect that charter as any legislative act passed without reference to that constitution. The constitution of 1851, in providing that there should be the power to regulate, modify, alter, or change charters, necessarily referred to charters thereafter passed or thereafter granted. It is well settled, under the decisions, that, so far as the contract feature of a company's charter granted in 1846 is concerned, it would be as much beyond the power of a convention making a new constitution to affect it, as it would be beyond the power of the legislature to affect it. The whole sovereign people of Ohio, gathered together in convention, could not make a new constitution that would affect the rights of a corporation thus created in 1846.

"We come on down to an act of the legislature subsequent to the adoption of the constitution of 1851, an act which was passed after all the vested rights of this corporation had accrued, the date of which will be ascertained by a reference to the act, and which

was an act authorizing municipalities in which gas companies are located or doing business to fix the price at which the gas shall be sold. We find the Supreme Court of Ohio construing that act, saying, in substance, and in effect, that the price thus fixed by the municipal corporation is conclusive, unless it is attacked for fraud; that it may be attacked for fraud. We find then the municipal council of Cleveland fixing the rate of charge which this complainant shall make for its gas to consumers at 60 cents per thousand feet. The bill alleges distinctly, as a matter of fact, and not as inference of law, that it cannot manufacture and deliver gas at less than \$1 per thousand feet, without loss, and that the city in fixing the price at 60 cents per thousand feet has fixed it at a price greatly less than that at which it can manufacture and deliver the gas. It claims that this is a taking of their private property without due process of law; and it alleges that this action was had without notice. These are all facts that we have to take as conceded by the demurrer.

"The question that now faces the court is whether a municipal corporation, itself a consumer of gas, as alleged in the bill, in its corporate relation to the company, to the extent of \$5,000 or \$6,000 per month, can,

under the legislative sanction conferred by Section 2478 of the Revised Statutes of Ohio, fix, or has the constitutional right to fix, the terms or price at which itself and all other consumers shall pay for the gas furnished. It would be a fearful proposition, monstrously absurd and outrageous, if the legislature were to undertake to confer upon a citizen of Cleveland the right to say at what price services should be rendered to him, or what he should pay for goods and articles furnished him. There is hardly any law in this land that would make the party being furnished the judge of the price that he should pay, or would say that his arbitrary decision should fix the rights of the parties. The city of Cleveland has undertaken to do that thing under this Section No. 2478, as disclosed by the bill. I am only dealing with the facts disclosed in the bill. She has undertaken to say that for the gas furnished to herself and to every consumer in this community, the complainant shall only have and receive 60 cents per 1000 feet, 40 per cent. less than complainant can manufacture gas and deliver it for. The complainant comes into this court, and in its bill, in substance and effect says three things; you are by that action impairing the obligation of a contract that was made in

1846 between ourselves and the sovereign state of Ohio; and that you cannot do that under the constitution of the United States, which is the paramount law of this land, and which prohibits any state from impairing the obligation of a contract, either doing so directly or through the instrumentality of a municipal corporation by delegated authority. The thing cannot be done and ought not to be done. If we reflect about it for a moment, we will see that those two features of the Constitution of the United States—the prohibition against the impairment of the obligation of contracts, and the interstate commerce clause of the Constitution; the protection of persons and property against arbitrary action upon the part of the states—are the very fundamental principles upon which the preservation of this government must rest.”

VII.

The power of a state, reserved by its constitution, to alter, amend, or repeal, general laws concerning corporations, is subordinate to and limited by the provisions of the Federal Constitution, inhibiting laws impairing the obligations

of contracts, depriving persons or corporations of their property without due process of law, or denying the equal protection of the laws; rights acquired, and capital invested, by a corporation, or its stockholders, in the lawful exercise of power conferred by such laws, are within the protection of such constitutional provisions, and cannot be arbitrarily destroyed by subsequent state legislation.

Wells Fargo & Co. v. O. R. & N. Co., 8 Saw. 600.

Ex parte Koehler, 11 Saw. 37.

Ball v. Rutland R. Co., 93 Fed. 513.

San Joaquin & Kings R. Co. v. Stanislaus County, 113 Fed. 930.

Stone v. Y. & M. V. R. Co., 62 Miss. 607.

Pingree v. Mich. Cent. R. Co., 118 Mich. 314.

State v. S. P. Co., 23 Or. 424.

In the case of *Stone v. Y. & M. V. R. Co.*, 62 Miss. 607, CAMPBELL, Chief Justice, in the course of his opinion, at page 641 said :

“ Section 6 of the charter of the appellee confers on the company power to fix from time to time by its board of directors the rates at which it will transport persons or property over its railroads, provided they

shall not exceed a maximum specified in the act.

"The power to contract is an essential attribute of sovereignty and is of prime importance. Its exercise has been productive of incalculable benefits to society, however great may be the evils incident to its injudicious employment. It cannot be denied merely because of its liability to abuse. The power to contract implies the power to make a valid contract. Chartering railroad companies and other similar associations has long been an acknowledged and a favorite exercise of legislative authority. The right to grant charters includes the right to grant such as will be upheld. Conferring power on the grantee of the franchise to fix rates of compensation at discretion, or within prescribed limits fixed by the charter, has been the common practice of the legislatures of the states of the United States from an early period of their history. The right of the corporators to exercise the powers conferred by the act of incorporation, whether to fix rates themselves or to take those fixed by their charter, and to rest securely on its provisions in this respect, has hitherto been generally regarded as indisputable.

"A grant in general terms of authority

to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable. It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation that the power of the legislature afterward to interfere can be denied. It is not to be presumed that the right of legislative control was intended to be renounced. Every presumption is against that. If the grant can be interpreted without ascribing to the legislature an intent to part with any power it will be done. Only what is plainly parted with is gone. Fixing rates in a charter is a specification of what is reasonable, an exclusion of tacit or implied conditions on the subject. It is an essential part of the contract of incorporation, the most important condition of its existence, the inducing cause of its acceptance.

“That it was the legislative intent to vest in the appellee the unrestricted right to fix rates within the limits prescribed by the charter, is clear; that this was a valid contract by the state, obligatory and inviolable by it, we regard as settled authoritatively by Federal and state decisions too numerous for

citation. If anything is or ever can be settled in American constitutional law, the sanctity and inviolability of a contract between a state and individuals in the shape of a charter for a business enterprise, accepted and acted on by the corporators on the faith of its terms and provisions, must be so regarded.

"The appellee has the unquestionable right from time to time, by its Board of Directors, to fix the rates at which it will transport over its railroads, provided those rates shall not exceed the maximum prescribed by the charter. That is the contract. These terms were expressly made. On the faith of them capital was invested and the enterprise set on foot. It is not allowable now for one of the contracting parties to interfere with the exercise by the other of its plainly granted rights. They are secured beyond the reach of legislation and cannot be impaired. The state cannot, by an act of its legislature, abdicate the right to govern artificial as well as natural persons, but it may create corporations, and where they are not a part of the machinery of government, the franchise cannot be resumed by the legislature or its benefits be essentially impaired without the consent of the grantee. To hold otherwise would be revolutionary and disturb the foundations of society as

molded by the judicial utterances of half a century of constitutional government in America.

"While the rates at which the appellee will transport over its roads, not exceeding what is stipulated for in the charter, is for the determination of the appellee and not subject to the control within the chartered limits of the state, it is indisputable that the state may create a commission or board by any name to see that the creature of the state keeps within its charter limits and violates none of its obligations as a common carrier. Whatever the charter rights of the appellee, there are many police regulations the state may lawfully adopt, and it may commit their enforcement to any agency of its selection. It may intrust the oversight and supervision of the operations of railroads to a commission charged with the duty of guarding against abuses the state has the right to correct.

"We do not feel called on to pass upon all of the numerous provisions of the act complained of, and will decide only so much as will properly dispose of this case, leaving other questions to be decided as they arise. The bill is to restrain the commission 'from interfering with the tariff of charges of (complainant), or with the operation, control, or income of said railroad * * * and from

* * * any revision of orator's tariff, or from instituting or aiding in the prosecution of suits for recovery of penalties under said acts, or doing anything under said acts as to orator.'

"In view of what is written, it must be held that the railroad commission cannot interfere with the rates fixed by the Board of Directors of the appellee from time to time for transporting persons and property over its railroad, if those rates are within the limits prescribed by the charter, and that the commission cannot adopt any rule or regulation as to rates violative of the clearly expressed or necessarily implied charter rights of the company; but while this is true, the commission may investigate the control and operation of the company in order to ascertain that it is conforming to its authorization by the charter. It may do many things contemplated by the act creating it, without any violation of the inviolable rights of the company. No reason is perceived why the company may not be required to submit its tariff of charges to the commission in order that it may see that it conforms to the limits fixed by the charter."

The cases of *Wells Fargo & Co. v. O. R. & N. Co.*, 15 Fed. 561, *Ex parte Kochler*, 23 Fed.

529, and *State v. S. P. Co.*, 23 Or. 424, are not in conflict with the doctrine above stated.

In the case of *Ex parte Koehler*, 23 Fed. 529, DRADY, Judge, at page 530, said :

“ So far as the act undertakes to fix the charges for carrying passengers and freight it is claimed to be void, on the ground that it impairs the obligation of the contract of the state with the corporation, to the effect that the latter might prescribe and fix its own tolls and charges, contrary to Section 10 of Article 1, of the national constitution. By Section 2, of Article 9, of the Constitution of Oregon, it is provided that ‘ corporations may be formed under general laws. * * * All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate right.’ The Oregon & California Railway Company was formed under the general corporation act passed pursuant to this constitutional provision on October 14, 1862, which act contains the following section : ‘ Sec. 36. Every corporation formed under this act for the construction of a railway, as to such road, shall be deemed a common carrier, and shall have power to collect and receive such tolls or freights for

transportation of persons or property thereon as it may prescribe.' (Laws Or. 532.)

" In *Wells Fargo & Co. v O. R. & N. Co.*, 8 Sawy. 614, s. c. 15 Fed. Rep. 561, this court held that this section only authorized the corporation to charge a reasonable compensation for the transportation of persons and property; but that so far it constituted a contract between the state and the corporation, the obligation of which it could not impair by any subsequent legislation. This conclusion, of course implies that the right or franchise of the corporation to demand and have a reasonable compensation for the carriage of persons and property is a "vested" one, within the meaning of the Constitution of the state, and therefore cannot be impaired or destroyed by the legislature under the power to alter, amend, or repeal the general corporation act.

" But it is admitted that the right of the corporation to fix its rates and fares is not absolute, and that, if necessary, the legislature may limit the same to what is reasonable. Nor, in my judgment, is the power of the legislature over the subject absolute. It cannot require the corporation to accept less than a reasonable compensation for its services. And while the presumption may be, and doubtless is, that any rate which the

legislature may prescribe is a reasonable one, such presumption is not conclusive, and may be overcome by evidence to the contrary in any case when the question arises before the courts."

In any event, the cases last cited, hold that a railway corporation, formed under the General Incorporation Act of Oregon of October 14, 1862, has a vested right to collect and receive a reasonable compensation for the transportation of persons and property over its road, which the legislature cannot impair or destroy.

The Railroad Commission, in its order of September 21, 1910, made a finding that the class rates of appellants, then in force in the State of Oregon, were unjust, unreasonable, and excessive, and unjustly discriminatory; and also made the further finding that the rates, which it substituted in lieu thereof, were just and reasonable and non-discriminatory. The bill of complaint alleges on the other hand, that the rates which the appellants were receiving and collecting, afforded no more than a just and reasonable compensation for the transportation of property over their railroad. Therefore, whether or not the rates prescribed and fixed by the Commission impaired or destroyed any vested corporate

right of the appellants, can be determined only by ascertaining whether or not the rates thus fixed by the Commission afforded appellants a reasonable compensation for the transportation of property over their road. *This is a question of fact to be determined by the court, from all the facts and circumstances in the case.*

It is claimed that under these constitutional and statutory provisions the Articles of Incorporation constitute a contract which the state cannot impair by the creation of a railroad commission, giving such commission authority to prescribe or fix rates, and that inasmuch as the Articles of Incorporation of the Oregon & California Railroad Company were executed on March 16, 1875, and those of its predecessors in interest, prior thereto, and while these statutory and constitutional provisions were in effect, that the Railroad Commission Act and the order of the Commission thereunder are and each of them is void.

It is respectfully submitted that under this state of facts the complainants have the power to collect and receive such tolls or freights for transportation of persons or property thereon, as they may prescribe, and that all railroad companies incorporated under the laws of this state

prior to the passage of the Railroad Commission Act, have a vested right to fix those rates, leaving the question of reasonable rates as it exists at common law.

Missouri Pacific R. Co. v. Kansas,
216 U. S., 262, 274.

P. R. L. & P. Co. v. R. R. Co., 105
Pac., 709.

Hammond Packing Co. v. Arkansas,
212 U. S., 322, 345.

C. M. & St. P. R. Co. v. Minnesota,
134 U. S., 418.

Stone v. Farmers' Loan & Trust Co.,
116 U. S., 307.

Pa. R. Co. v. Miller, 132 U. S., 705.

Houston & T. C. R. Co. v. Storey,
149 Fed., 499.

E. & N. R. Co. v. Kentucky, 183 U.
S., 503.

San Antonio Traction Co. v. Allgeld,
200 U. S., 304.

State ex rel. N. P. Ry. Co. v. R. R.
Com., 140 Wis., 145.

While the rule of law announced in the foregoing cases as applying to the particular facts in each case is sound, the question is one of application to the particular language of our state constitution, and the construction of the contract created by the Articles of Incorporation as con-

strued in connection with Section 34 of the Act of October 14, 1862.

In the case last cited, Mr. Justice KERWIN, speaking for the court, says at p. 157 :

"The right to alter or repeal existing charters is not without limitation when the question of vested property rights under the charter is involved. The power is one of regulation and control, and does not authorize interference with property rights vested under the power granted."

Commonwealth v. Essex Co., 13 Gray, 239.

Sinking-Fund Cases, 99 U. S., 700.

Shields v. Ohio, 95 U. S., 319.

Miller v. State, 15 Wall., 478.

Holyoke Co. v. Lyman, 15 Wall., 500.

Pearsall v. G. N. R. Co., 161 U. S., 646.

It will be noticed that the power to alter, amend, or repeal a law passed pursuant to Section 2, Article XI of the Constitution of the State of Oregon, is entirely different from the reservation upon that subject contained in most state constitutions. The language used in Section 2, Article XI, is:

"All laws passed pursuant to this section may be altered, amended or repealed but not

so as to alter or destroy any vested property rights."

The question then is whether under the Articles of Incorporation, pursuant to Section 34 of the Act of October 14, 1862, which provides:

"Every corporation formed under this act for the construction of a railroad, as to such road shall be deemed common carriers, and shall have power to collect and receive such tolls or freight for transportation of persons or property thereon as it may prescribe"

created a vested right which could not be impaired by subsequent legislation. It is, of course, clear that a Railroad Commission Act which authorizes a Railroad Commission to promulgate and enforce reasonable rates or a state statute which fixes a schedule of rates, would necessarily take away from the complainant its power to collect and receive such tolls or freight for transportation of persons or property as it might prescribe. The sole question under this branch of the case is whether the judgment of the carrier in fixing rates for transportation of persons or property shall be supervised, regulated and supplanted by the judgment of the state exercised through a Railroad Commission,

or shall it remain as it was at common law, within the exclusive power and jurisdiction of the carrier to fix these rates, subject only to the power of the courts upon judicial inquiry, to denounce and decline to enforce rates that are excessive and unreasonable. If the carrier, under this constitutional provision and statute, has the exclusive right to prescribe such reasonable rates as in its judgment should be collected subject only to judicial review as at common law, then it follows necessarily that the statute cannot fix these rates by a Commission or otherwise, although subject to judicial review. The Commission Act would, therefore, be unconstitutional in so far as it undertakes to confer authority to fix the rates of a carrier thus incorporated, or to enforce what such Commission might determine to be reasonable rates, and from this it would follow that the order of September 21, 1910, would be necessarily void.

See also *State v. G. N. Ry. Co.*, 100 Minn. 445, 457, and authorities cited.

Stone v. Y. & M. R. Co., 62 Miss. 607.

C. B. & Q. R. Co. v. Jones, 149 Ill. 361, 393.

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Pingree v. Michigan Central R. Co.

118 Mich. 314.

Ball v. Rutland R. Co., 93 Fed. 513.

VIII.

The Railroad Commission Act of February 18, 1907, is void because of excessive penalties and unusual burdens imposed for any refusal to observe the orders of the Commission. The Act is oppressive and confiscatory by reason of such excessive penalties and burdens. This question is raised, and the validity of the Railroad Commission Act challenged by appropriate averments found in Paragraph XIII, pages 40-42, Record, also subdivision "z", page 46, and other averments showing that the order of September 21, 1910, if enforced, would be confiscatory.

Ex parte Young, 209 U. S. 123.

Whether the said rates prescribed by the Railroad Commission are reasonable or unreasonable, is a judicial question and the legislature cannot prohibit the courts from passing thereon, directly or indirectly, by imposing such penalties as are calculated to terrorize or intimidate a rail-

way company, its officers or agents, so that they are thereby prevented from litigating the question of the reasonableness of the rates, or the validity or invalidity of the same.

Chicago, M. & St. P. Ry. Co. v.

Minnesota, 134 U. S. 418.

Ex parte Young, 209 U. S. 123.

Willcox v. Gas Co., 212 U. S. 19.

Consolidated Gas Co. v. Mayer, 146
Fed. 150.

Missouri K. & T. R. Co. v. I. & C.,
164 Fed. 645.

Western Union Tel. Co. v. Myatt, 98
Fed. 335.

Central of Georgia Ry. Co. v. R. R.
Com. of Alabama, 161 Fed. 925.

St. Louis & S. F. R. Co. v. Hadley,
168 Fed. 317.

The court will take judicial notice of the provisions of the Railroad Commission Act of Oregon, fixing the penalties which shall be imposed upon the railway company violating the provisions of the Act. An inspection of this Act will disclose the fact that the penalties therein provided are excessive, and calculated to deter railway companies from litigating their rights in the courts. For this reason the demurrers should have been overruled.

IX.

The Railroad Commission Act is void because it requires complainants to prosecute any suit to set aside any order made by the Commission, in the Circuit Court of the State of Oregon for the County of Marion, thereby depriving the complainants of their right to litigate their cause in any court of the state, and in the courts of the United States, and is thereby violative of the Fourteenth Amendment to the Constitution of the United States.

Central of Georgia R. Co. v. R. R. Co., 161 Fed. 925.

Herndon v. C. R. I. & P. R. Co., 218 U. S. 135.

Western Union Tel. Co. v. Kansas, 216 U. S. 1.

Pullman Co. v. Kansas, 216 U. S. 56.

Lukwig v. Western Union Tel. Co., 216 U. S. 146.

Southern Ry. Co. v. Greene, 216 U. S. 400.

The cases just cited, it is true, hold that state statutes subjecting a foreign corporation authorized to do business within a state to restrictions which would prevent such corporation from liti-

gating its rights in the Federal Courts or removing suits or actions brought against it to the Federal Court, are void, and yet the principles underlying these cases apply to the Railroad Commission Act, if the limitation requiring the carrier to litigate the reasonableness of rates prescribed by the Commission in the State Circuit Court for Marion County, shall be held jurisdictional and a prerequisite to judicial review. In other words, if the only judicial review must be had in a state court and the act would not have been passed but for this provision, the entire act should be held void.

There is a conflict of opinion as to whether or not jurisdiction can be conferred upon a court to determine as a fact whether or not rates prescribed by a Railroad Commission are unreasonable, but the weight of authority, in our opinion, is that such jurisdiction can be so conferred. However, the Railroad Commission Act provides by its express terms for a judicial review of any order of the Commission affecting rates, fares, charges, classification, joint rate or rates, regulations, practice, or service.

Ex parte Young, 209 U. S. 123, 144.

Chicago etc. R. Co. v. Minnesota,

134 U. S. 418.

Reagan v. Farmers' etc. Co., 154

U. S. 369, 399.

St. Louis etc. R. Co. v. Gill, 156

U. S. 649.

Covington, etc. Co. v. Sandford, 164

U. S. 578.

Smyth v. Ames, 169 U. S. 466, 522.

Chicago, etc. Co. v. Tompkins, 176

U. S. 167, 172.

If jurisdiction cannot be conferred upon a court to determine whether or not rates so prescribed are unreasonable, then the Act must be held void, because it is apparent that the Act would not have been passed but for the provision relating to judicial review. Whether the provision for judicial review constitutes an essential part of the rate-making power conferred by the Act, is open to question. If the provision for judicial review is a part of the rate-making power, then the Act is void because rate-making is not the function of a judicial tribunal.

Prentiss v. Atlantic Coast Line Ry.

Co., 211 U. S. 210.

Assuming that the Act is valid, and confers authority upon the courts to review and set aside the rate or body of rates promulgated by the Commission, when found by the court to be un-

reasonable in fact, it is respectfully submitted that the Federal Court, recognizing the right created by this state statute, for judicial review of an unreasonable rate, will assume jurisdiction and enforce this right created by the statute, and will determine whether or not such rates are unreasonable in and of themselves, and independently of the question whether or not the reduction effected by such rates would deprive the railroad company of a just and fair return upon its property. The rate may be unreasonable in fact in and of itself, or an order prescribing rates may be subject to judicial review because the rates prescribed are as a matter of fact unreasonable, even though the reduction thereby effected cannot be said to be confiscatory in whole or in part.

Delaware L. & W. R. Co. v. Stevens,
172 Fed. 595.

Chicago I. & L. R. Co. v. Hunt, 79
N. E. 927.

Lord's Oregon Laws, Sections 6910,
6911, 6912, 6913, 6914.

Pomeroy's Equity Jurisprudence,
Sec. 293, note pages 499, 500, 501,
502, 503, 504, 3rd ed.

Richardson v. Green, 61 Fed. 423.

- Fitch v. Creighton*, 24 Howard 159,
163.
- Brine v. Insurance Co.*, 96 U. S. 627.
- Ex parte Yarbrough*, 110 U. S. 651,
666.
- Holland v. Challen*, 110 U. S. 15.
- Williams v. Crabb*, 117 Fed. 193.
- Wart v. Wart*, 117 Fed. 766.
- Atchison, T. & S. F. R. Co. v. Love*,
174 Fed. 59.
- Sawyer v. White*, 122 Fed. 223, 227,
citing many cases.
- Railroad Commission v. Houston &
Texas R. Co.*, 90 Tex. 340.
- M. L. & T. R. & S. S. Co. v. Rail-
road Commission*, 109 La. 247.
- N. P. Ry. Co. v. R. R. Commission*,
106 Pac. 611.
- C. B. & Q. R. Co. v. Jones*, 149 Ill.
361.
- Janvrin, Petitioner*, 174 Mass. 514,
517.
- R. R. Co. v. R. R. Commission*, 136
Wis. 146.
- The State v. Railway Co.*, 76 Kan.
467.
- Michigan Central R. Co. v. Michigan
R. R. Com.* 160 Mich., 355.

Michigan Central R. Co. v. Circuit Judge, 156 Mich. 459.

Texas & P. R. Co. v. R. R. Commission, 127 La. 387; s. c. 53 So. Rep. 660.

State v. Railroad Commission, 110 Pac. 1075.

To determine whether the bill of complaint is sufficient as against a demurrer, the general rule is that if the allegations state ultimate facts, the complaint will be deemed sufficient without requiring a detailed statement of particular facts from which the ultimate facts are to be found.

State ex rel. v. Railroad Commission, 48 Fla. 129, 145.

Allen v. O'Donald, 23 Fed. 573, 576 (DEADY, J.).

St Louis v. Knapp Co., 104 U. S. 658, 660.

Wallace v. Arkansas Central R. Co., 118 Fed. 422.

Houston & T. C. R. Co. v. Storey, 149 Fed. 499, 501.

South & N. A. R. Co. v. R. R. Commission of Alabama, 171 Fed. 225, 227.

A complaint of a railway company which alleges positively and unequivocally that the freight transportation rates prescribed and fixed

by a Railroad Commission, are unreasonable and that they do not give to the railway company a fair and reasonable compensation for the services required to be performed by it, is sufficient to tender an issue as to the reasonableness of such rates, without setting up all the facts bearing upon the question. General certainty is sufficient in pleadings in equity.

Story's Equity Pleadings, Section,
252, 253.

St. Louis v. Knapp, 104 U. S., 658.

Allen v. O'Donald, 23 Fed., 573.

Houston & T. C. R. Co. v. Storey,
149 Fed., 499.

State ex rel. Railroad Commission v.

S. A. L. Ry. Co., 48 Fla., 128.

O'Hare v. Downing, 130 Mass., 16.

The bill of complaint alleges facts showing that the rates fixed by the Railroad Commission are unreasonable and that they do not give to the companies a fair and reasonable compensation for the services required to be performed by appellants, and this is, therefore, sufficient under the authorities.

It is, of course, well settled that the courts, both Federal and State, will review the order of a Railroad Commission where it appears to be

confiscatory, and this without regard to the penalties or burdens imposed by the statute and this upon constitutional grounds, but there is a conflict of judicial opinion as to whether or not the courts will review the action of a Railroad Commission having authority to fix a reasonable rate when the question is whether or not the rate is or is not unreasonable and where it is not claimed that the rate promulgated is in and of itself necessarily confiscatory.

If it shall be held that under the Railroad Commission Act of February 18, 1907, as amended February 23, 1909, that the courts cannot review the order of a Railroad Commission made within its jurisdiction, which is claimed to be unreasonable or oppressive, or that the courts cannot review the reasonableness of a rate or body of rates which may or may not be confiscatory, and if the only question that can be determined by the courts in that behalf is whether or not the Commission had jurisdiction to make an order promulgating the rate or the order promulgating or regulating the service, then the Railroad Commission Act should be and is void, because it would be in effect class legislation, and while applicable to all transportation companies affected thereby, it would not give to the particular trans-

portation company or carrier a constitutional right to determine an issue of fact, judicial in character, committed irrevocably under that view of the statute to an administrative body called a "Railroad Commission," or to a body exercising an administrative function. Such a construction of the act would result in the necessary conclusion that it was unconstitutional and void. There is no reason in principle why a finding of fact which forecloses and determines the property rights of a railroad company should be fixed irrevocably by an administrative board and placed beyond judicial review, when every other issue or finding of fact affecting the pecuniary interests of other persons in their vocations or callings or business may question by judicial procedure the validity of the finding so affecting pecuniary rights. The fact that the property owned by a railroad company is devoted to public service and public use does not destroy its private ownership or take from that property, as private property, any essential pecuniary right, and any construction of a Commission Act which makes the finding or order of the Commission upon a question of fact conclusive upon the carrier and the public and conclusive upon the courts, is a denial of the

equal portection of the laws and a deprivation of property without due process of law.

We are not unmindful of the opinion of the Supreme Court of the United States in the case of *Interstate Commerce Commission v. Ill. Cen. R. Co.*, 215 U. S. 452, which it is claimed is to the effect that the orders of the Interstate Commerce Commission prescribing reasonable rates are not subject to judicial review, if such orders were within the jurisdiction of the Commission.

In the case last cited, Chief Justice WHITE, speaking for the court, says at p, 442 :

" In the argument at bar, the railroad companies do not question that if a complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate, that body has the authority to examine the subject, and, if it finds the rate complained of is, in and of itself, unreasonable, having regard to the service rendered, to order the desisting from charging such rate, and to fix a new and reasonable rate, to be operative for a period of two years. The companies further do not deny that where the Commission exercises such authority, its finding is not subject to be reviewed by the courts, *Interstate Commerce*

Commission v. Illinois C. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. Rep. 155. In other words, the argument on behalf of the railroads fully concedes that an order of the Commission is not open to attack in the courts so long as that body has kept within the powers conferred by the statute."

Referring to the case of *Interstate Commerce Commission v. Illinois Central Railroad Co.*, 215 U. S. 452, the Interstate Commerce Commission in its 24th annual report, page 17, says:

"The railroad company contended that the Commission had no jurisdiction over this rule or practice, and, further, that in case it had, the court might re-examine the conclusion of the Commission, and should set aside that conclusion as erroneous in this case. The Supreme Court held that the Commission had jurisdiction and that its conclusion was not reviewable by the courts. This case apparently lays down the broad principle that the courts have no jurisdiction to review the discretion of the Commission if it acts within the limits prescribed by the statute and if its order does no violence to the Federal Constitution that order cannot be disturbed by the courts."

It must be borne in mind, however, that these decisions are predicated upon an act of Congress which gave to the Interstate Commerce Commission authority in specific terms to set aside unjust or unreasonable rates and to promulgate in lieu thereof just and reasonable rates, *leaving in the Commission authority to set aside, suspend or modify the order made in that respect or to set aside or suspend the same*, while here, the order under consideration may be suspended and set aside by a court of competent jurisdiction under express authority so conferred upon the courts to determine whether or not the rate prescribed is in and of itself unreasonable, independently of the question whether or not it is confiscatory, and it will be noticed that if, under that act, a Circuit Court of the United States could not set aside a rate which was in and of itself unreasonable when promulgated by the Interstate Commerce Commission, then under the act to create the Commerce Court, such authority for judicial review is withheld, for it is expressly provided by this act that "nothing contained in this act shall be construed as enlarging the jurisdiction now possessed by the Circuit Courts of the United States, or the judges thereof, that is hereby

transferred to and vested in the Commerce Court," although jurisdiction is given to the Commerce Court of cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission. If logically there was no authority for judicial review of the reasonableness of an order made by the Interstate Commerce Commission or of an individual rate promulgated by the Interstate Commerce Commission, then it would seem to follow that the only thing that can be determined by the Commerce Court is whether or not the order or rate made was within the jurisdiction of the Interstate Commerce Commission, and under all the authorities whether or not the order or the rate or body of rates was so far confiscatory of the property of the carrier as to constitute a taking of the property without just compensation. But assuming that the cases cited hold that the courts cannot review the decision of the Interstate Commerce Commission as to whether or not an order or a rate in and of itself is unreasonable, and can only determine whether the order or rate is within the jurisdiction of the Interstate Commerce Commission, it does not follow that where,

as here, a state statute authorizes a railroad commission to promulgate a rate effective unless suit is brought to set it aside, and where the statute expressly provides for judicial review of the rate thus authorized to be made, the courts may not annul or set aside an unreasonable rate or order. In such cases the Federal Courts will enforce that right and will not send the complaining carrier to the state court, although the statute provides or designates the state court as the court of judicial review. Under the state statute the rate becomes effective unless suit is brought to annul the rate and set it aside or the same is adjudged in that suit unreasonable. Upon well settled principles the right thus conferred impinges upon and qualifies the power of the Commission to make an *effective and final rate*. Such rate, when made, is expressly made subject to suspension or annulment by judicial review, and under the authorities that right is a substantive one, relating to the *power of the Commission*, and is *not a mere remedy to carry into effect the orders of the Commission*. It is not a rate-making power, but it is a judicial power. That power when exercised does not make a new rate but determines the fact

whether the rate promulgated by the Commission is or is not unreasonable or whether or not the order of the Commission as to some other subject within its jurisdiction is or is not unreasonable.

Counsel for defendants contend that fixing a rate is a legislative function, and that the courts, in the exercise of judicial power, cannot promulgate or fix a rate. We have cited numerous authorities to the effect that the power to make a rate is legislative, when declared by law, and that the Commission executes the law, as an administrative body. Promulgation of a rate to be observed is a rule of conduct for the future, and partakes of the nature of legislation, although strictly speaking it is merely administrative, carrying out a rule of law fixed by the legislature. It is fundamental that legislative power cannot be delegated to a commission, but the legislature may create a rule of action, or may by statute declare that all railroad rates shall be just and reasonable, and create a commission to ascertain the facts and apply this legislative rule. *In the exercise of these functions by a commission, the inquiry is one of fact and not one of law, and the determination of this body*

upon any question of fact is not conclusive upon the judiciary, but it is clothed with a presumption that the finding is prima facie reasonable. Any statute that would make the findings of any administrative body of this character conclusive upon a question of fact would be unconstitutional and void. Therefore it is contrary to fundamental principles to assume that the determination of the question of fact whether or not a specific rate or body of rates is or is not reasonable, is the exercise of legislative or administrative functions by the courts. It proceeds upon the theory of judicial inquiry, and many of the authorities cited by counsel in support of their contention that the findings of fact of a railroad commission are conclusive as to the reasonableness of a rate or order, and cannot be reviewed by the courts, are cases in which the courts decline to disturb the findings of the commission or tribunal, upon the ground that these findings were clothed with a prima facie presumption of reasonableness. The question was not one of power, but one of judicial conclusion, and in no case has it been directly ruled that the courts will decline to review the reasonableness of a rate in and of itself, or the reasonableness of an order in and of itself, where there was a

controversy as to the questions of fact underlying the order or action of the Commission.

The nearest approach to a determination of this question is found in the case of *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U. S. 452, followed by that court in *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 433. But it is respectfully submitted that in neither of these cases, even under the Interstate Commerce Act, was it directly determined that there could be no judicial inquiry as to the reasonableness of an order or rate, *depending upon disputed questions of fact*. But, however that may be, no such contention can be made in the case at bar, for the reason, if for no other, that by the express provisions of the statute from which the Railroad Commission derives its power, a right is created which expressly authorizes judicial review not only of the reasonableness of the rate in and of itself, but of any order which the Commission may make. Like provisions in other jurisdictions have been sustained and enforced, not only by the state courts under their general powers, and independently of any limitation as to the particular court in which such judicial review is to be had, but in the Federal courts as well.

In *Missouri K. & T. R. Co. v. Love*, 177 Fed. 493, 502, HOOK, C. J., says :

"The demurrers : It is argued that the freight and passenger rates are still in legislative process, and therefore within the doctrine of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 20 Sup. Ct. 67, 53 L. Ed. 150, not properly the subject of judicial consideration. Both phases of this contention have already been considered in connection with the pleas. 174 Fed. 59. It is the law of the land that a state may not confine to its own courts a citizen who claims his rights under the Constitution of the United States have been denied. And the Supreme Court did not hold in the *Prentis Case* that a similar result could be accomplished by prescribing and enforcing under penalties a legislative rule, even though tentative, and restricting the remedy of the citizen to subsequent legislative inquiry and action."

It will be borne in mind that *Prentis v. Atlantic Coast Line*, 211 U. S. 210, had under consideration the action of the State Corporation Commission of Virginia under a provision of law which provides that the jurisdiction of the Supreme Court of Appeals, on appeal, should

revise and correct these rates, and it was there held that proceedings for fixing rates and charges, whether in the Commission or in the Court of Appeals, on appeal, were *legislative* in character, although the principal aspect of these tribunals might be judicial. In other words, it was said that the legislative or administrative proviso fixing the rates complained of was not so complete as to give an absolute, unqualified right to resort to the courts. As stated by Hook, Circuit Judge in *Atchison T. & S. F. R. Co. v. Love*, 174 Fed. 59, 63:

"Complainants did not invoke the jurisdiction of the Commission, as authorized by the above proviso, but brought these suits after some experience with the rate prescribed. It cannot be assumed the Commission would have failed to give them relief if they were entitled to it; but the questions now before the court are whether they should have first gone there before bringing these suits, or were absolutely required to seek their remedy in the Commission and the Supreme Court of the state as tribunals of exclusive jurisdiction. The doctrine of the *Virginia cases* does not apply because the prescription of the passenger rate had passed the legislative stage, and

had become a completed rule of action. As regards the question here, the constitutional provision is not different from an act of the Legislature definitely fixing rates and committing to some particular state tribunal jurisdiction to determine their reasonableness, and if found unreasonable then legislative power to substitute other rates in their stead. The situation presented is that of a case calling for judicial inquiry and determination, and the second question is whether they may be had in this court, or must be had in the state tribunals. Upon that, the following principles, believed to be firmly imbedded in the jurisprudence of this country, are decisive: When the jurisdiction of a court of the United States is invoked upon sufficient grounds, it cannot be relieved of its duty to take cognizance and proceed, either by constitutional provision or by legislative act of a state. If, according to recognized principles of jurisprudence, the case is in its essential features a civil action at law or in equity, it matters not that the state may have denied the complaining party access to its courts, or may have designated some particular local tribunal, to the exclusion of all others, state and national. The test is the existence of a controversy and its character, and the presence of grounds

of federal jurisdiction, not whether the courts of the state are open, or to what extent. The exercise of jurisdiction so invoked is the right of the litigant under the supreme law of the land. It is a duty of the court, which may not be avoided. *Lawrence v. Nelson*, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 40, 20 Sup. Ct. 192, 53 L. Ed. 382; *Spencer v. Watkins* (C. C. A.) 169 Fed. 379."

Under the Oregon Railroad Commission Act, Sections 31, 32, 33, 34, 35 and 36, (Lord's Oregon Laws, Sections 6909, 6910, 6911, 6912, 6613, 6914) it does not appear that the authority and jurisdiction conferred upon the Circuit Court of Marion County is a part of the rate-making procedure prescribed by the Act, and if it had so provided, under the constitution of this state, which prohibits the exercise by the judiciary of any of the functions or duties of the legislative or the executive department, or the administrative department, such provisions so construed would be void. It therefore follows that the Commission may prescribe rates, fares, charges, classification, and joint rates, and that they are *prima facie* lawful and shall be in force, and *prima facie* reasonable, until found otherwise under and

pursuant to the provisions of Sections 31, 32, 33, 34, 35 and 36 of the Act, (Sections 6909, 6910, 6911, 6912, 6913, 6914 Lord's Oregon Laws). The court, in determining whether or not this presumption of reasonableness and of lawfulness shall stand or be overcome, enters upon the inquiry with the presumption that the rates are lawful and reasonable, and the burden of proof rests upon the contesting carrier. Under well settled rules, the action of the court in that behalf is judicial. The court does not assume to prescribe or promulgate a rate in lieu of the rate under attack, even though the court should find that such rate is unreasonable. It is true that if, upon the trial of such suit, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto, the court, before proceeding to render judgment—unless the parties to such suit stipulate in writing to the contrary—shall transmit a copy of such evidence to the Commission, and should stay further proceedings for fifteen days from such date, and that upon the receipt of such evidence, the Commission should consider the same, and might alter, modify, amend, or rescind its order, and if the Commission should rescind

its order, the suit should be dismissed; or if it should alter, modify, or amend the same, such altered, modified, or amended order should take the place of the original order, and judgment or decree should be rendered as though made by the Commission. If the original order should not be rescinded or changed, judgment should be rendered upon such original order.

This is a sort of hybrid provision which, in view of the constitutional inhibition against clothing a judiciary department with any of the functions of the legislative, executive, or administrative departments, must be held to be void. Especially is it inapplicable to the Federal Court. It is a mere procedure intended to allow the Commission to resume jurisdiction over the rate after the carrier has brought its suit to test the reasonableness of the rate under the order made.

It is respectfully submitted that when a Railroad Commission has made its order prescribing a rate which it deems to be reasonable, that it then *has exhausted its function as a rate-making body* as to that rate, and that any law which seeks to confer upon the commission jurisdiction to withdraw the provision for judicial review from operation, and to deprive the judiciary of the right to consider the matter, is an anomaly,

and one that cannot be held to be valid. The right to recall the order, and to oust the court of jurisdiction for the time being is made to depend upon the question whether the carrier, as a litigant in that suit, has introduced some other evidence than was before the Commission. Will counsel say what function the court is performing when it assumes jurisdiction? Is it acting in a legislative capacity, in an administrative capacity, and as a part of the rate-making power, and if so, when does it cease to so act, and when does it begin to act as a judicial tribunal?

It is freely admitted that a court cannot prescribe or promulgate a rate, for that is not a judicial function. It is equally true, however, that a court can and will set aside an unreasonable rate, which would of course have the effect to leave the jurisdiction of the Commission intact to proceed to promulgate a reasonable rate for the guidance of the carrier in the future.

By Section 12 of the Railroad Commission Act (Lord's Oregon Laws, Section 6887), the legislature has declared that "charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be reasonable and just, and every unjust

and unreasonable charge for such service is prohibited and declared to be unlawful." This is the rule of action prescribed by the legislature. The Commission has no legislative authority, but is charged with purely administrative functions, quasi judicial, perhaps, to ascertain upon its own initiative, or otherwise, from evidence offered and admitted, whether particular rates in effect are reasonable or unreasonable, and the conclusions of the Commission in that respect are findings of facts, and the findings of fact are clothed with the presumption that the order based thereon is *prima facie* reasonable.

Thus far the Commission does not act as a court, or perform a judicial function. Thereupon the statute, by the sections mentioned, attempts to create in favor of the carrier the right to judicial review, and it is respectfully submitted that that right of judicial review cannot be suspended in the heavens, like Mahomet's Coffin, and be called from the court to the Commission, or sent back by the Commission to the court, at the pleasure and option of the Commission, if, forsooth, the carrier should offer in the trial of the cause involving a judicial review, some little evidence that was not before the Commission when it was exercising its rate-making or *rate ascertaining function*.

We are, however, not without authority in support of the contention that where a statute, as here, has created a substantive right, that this right can be enforced in a judicial tribunal.

See

Northern Pac. Ry. Co. v. R. R. Commission of Washington, 106 Pac. 611.

Morgan's L. & T. R. Co. v. Railroad Commission, 109 La. 247.

Chicago, I. & L. Ry. Co. v. Hunt, 79 N. E. 927.

R. R. Commission of Texas v. H. & T. C. R. R. Co., 90 Tex. 340.

In *Railroad Commission v. Houston & Texas Central Railway Co.*, 90 Texas, 349, the court concluded by holding that the Railroad Commission Act of Texas provided for judicial review, and made the question of whether or not a rate prescribed by the Commission was unreasonable and unjust a question for the determination of the courts, as a judicial question.

See also

State v. Railway Company, 76 Kan. 467.

M. St. P. & S. S. M. R. Co. v. R. R. Commission, 136 Wis. 146, 158.

Mr. Justice TIMLIN, in the case last cited, says at p. 158 :

" Whether it is within the power of the legislature to confer upon courts authority to review the reasonableness of rules or orders of the Railroad Commission depends upon the fundamental nature of these rules or orders. If such rules and orders are *purely legislative* and violate no constitutional law or paramount federal statute, it would be incorrect to say that their reasonableness could be the subject of judicial review, because that would give the judicial branch of government a supervisory control over legislation, largely discretionary, and limited only by the judicial opinion of what is reasonable. * * *

" If this court, or the circuit court were by the statute in question authorized to investigate the subject *anew*, to put itself in the place of the Commission and search for this reasonable and just rate, *with power to substitute its own judgment of what is reasonable and just* for the judgment of the commissioners, the statute might be subject to grave criticism. But the courts are not by this statute so authorized. The authority given to the circuit court is not to search for or disclose or declare this "reasonable and just" rate

or service, but merely to determine whether the order of the Commission is "unreasonable"—quite a different thing. We think the legislature was within its power in conferring upon the courts such authority to inquire whether or not the order of the Commission was unreasonable and to vacate the order if so found. *In doing so the courts are required to exercise no legislative power, to ascertain and disclose no rates, to declare no rule or no law unreasonable, but merely to exercise judicial power to ascertain and determine whether the Commission has so far failed in its search for this lawful, just, and reasonable rate as to have found instead, and declared, that which is unreasonable*" (p. 164).

This language is peculiarly appropriate because the provisions for judicial review, and the general provisions of the Railroad Commission Act of Wisconsin have been substantially copied by the legislature of the State of Oregon in its adoption of the Railroad Commission Act of February 18, 1907.

See also

Janvurin, Petitioner, 174 Mass. 514.

Chicago, B. & Q. R. Co. v. Jones,
149 Ill. 361.

In the case last cited, the court, speaking by Mr. Justice MAGRUDER, says at p. 382 :

"Third, it is argued that the provision of the statute making the schedule of the commissioners *prima facie* evidence, that the rates therein fixed are reasonable maximum rates of charges, is unconstitutional and void, not only as depriving the carriers of their property without due process of law, but as infringing upon the right of trial by jury. We do not think that this objection should be sustained. In the first place, the act does not deprive the railroad corporations of the right to *have a judicial determination of the reasonableness of the rates, if they are not satisfied with the schedule made by the Commission. The courts are open to them for a review of the acts of the Commissioners in fixing the rates of charges.* In the next place, the provision is an exercise by the legislature of its undoubted power to prescribe the rules of evidence."

It is thus seen that under the Commission Act of the State of Illinois, where judicial review is provided, and where the findings of the Commission are clothed with the presumption that they are *prima facie* reasonable, the court sustained the provision for a judicial review, upon the ground that but for such judicial

review it might be contended that the rates prescribed would be void, and that the act fixing the rates would be unconstitutional in that it would deprive the carriers of their property without due process of law.

There is abundant authority for the proposition that where a substantive right or remedy is created by state legislation, that the Federal Courts will, as far as possible, in suits in which they have original jurisdiction, enforce this substantive right according to the practice of a court of equity. See *Williams v. Crabb*, 117 Fed. 193, and other cases hereinbefore cited.

Under the Railroad Commission Act of Florida, provision is made for judicial review of the rates promulgated by the Commission, and these provisions have been sustained.

State ex rel. R. R. Com. v. Seaboard, etc. Ry. Co., 48 Fla. 129, 144.

State v. Railroad Commission, 110 Pac. 1075.

Texas, etc. Ry. Co. v. R. R. Com. of Louisiana, 53 So. 660; same case 127 La. 387.

Houston & Tex. Cent. R. Co. v. Storey et al., 149 Fed. 499.

Delaware, L. & W. R. Co. v. Stevens, 172 Fed. 595.

The opinion of the court in the case last cited was announced by RAY, District Judge, and in that case the court says, at page 608 :

"It is urged, also, that the complainant company should not be permitted to come into the United States Circuit Court as it could sue or pursue a remedy in the courts of the state. If the legislative act was complete with the denial of the application to modify the order, *and the day had come when the order of the commission was to go into effect, as it had*, the complainant here had the right to go into the courts, and it had the right to select as its tribunal, any tribunal having jurisdiction of the parties and subject-matter. The complainant is a non-resident of the state of New York, and hence there is the necessary diversity of citizenship to give this court jurisdiction and a federal question is also involved. In such case, as matter of equity and of law, the complainant may go directly to the federal courts, and is, under no obligation to first test the questions in the state courts."

In Michigan Central R. Co. v. Circuit Judge, 156 Mich., 459, 470, the court says :

"We do not construe the provisions of this act to lodge in the courts the power to *establish* rates. The power conferred upon the courts is solely to determine whether the

rates are confiscatory or unreasonable. If the courts should so find, they are not authorized to determine what are reasonable, but the matter must again be referred to the Commission to establish other rates. If they are found to be reasonable, the courts will sustain the action of the Commission. If, however, it should be determined that such power was conferred upon the courts and is unconstitutional, the act would still be held valid, because it could stand with that clause eliminated from the statute. Courts declare legislative enactments invalid only when they are able to determine from the act itself that the legislature would not in all probability have enacted the law with the objectionable features eliminated."

See also

Michigan Central R. Co. v. Railroad Commission, 160 Mich. 355.

The case last cited discusses at length the distinction between the exercise of the power conferred upon or delegated to a Railroad Commission, and that created by a substantive right providing for judicial review of the action of such Commission.

See also

McGrew v. Missouri Pac. Ry. Co.,
230 Mo. 496.

Copper & Iron Mfg. Co. v. Manufacturer's Railroad Co., 230 Mo.

59.

Sleenson v. Great Northern Ry. Co., 69 Minn. 353.

Portland Ry. L. & P. Co. v. R. R. Com. of Oregon, 109 Pac. 273;
same case 105 Pac. 709.

State ex rel N. P. Ry. Co. v. R. R. Commission, 140 Wis. 145.

Central of Georgia R. Co. v. R. R. Com. of Georgia, 161 Fed. 925.

In re Arkansas Railroad Rates, 163 Fed. 141.

That a particular rate charged to be unreasonable will be reviewed is also sustained by judicial authority.

I. C. C. v. Chicago Great Western R. Co., 141 Fed. 1003.

People v. Willcox, 194 N. Y. 383.

Village of Saratoga Springs v. Gas Co., 191 N. Y., 123.

Louisville & N. R. Co. v. Brown, 123 Fed. 946.

King Lumber Co. v. A. & L. R. Co., 58 Fla. 292.

State v. Railroad Company, 58 Fla. 524.

Southern Ry. v. Atlantic Stove Works, 128 Ga. 207.

The case last cited involved the reasonableness of a schedule of rates for certain commodities.

Southern Ind. R. Co. v. Railroad Co.,
172 Ind. 113.

Under the Virginia constitution there was no inhibition which precluded the exercise by the Supreme Court of Appeals of administrative or rate-making functions, and the Railroad Commission Act of Virginia was held to be valid as not in violation of the constitutional provision permitting the exercise of such functions by a court.

Atlantic Coast Line R. Co. v. Commonwealth, 102 Va. 599.

That the Federal Courts will enforce a substantive right created by a state statute is well settled, but for convenient reference the attention of the court is called to

I. Pomeroy's Equity Jurisprudence,
Sec. 293 and notes. (Third Edition.)

Sawyer v. White, 122 Fed. 223, 227,
and cases cited by the Circuit Court
of Appeals, Eighth Circuit.

If the function of the Commission is found to be merely administrative, or quasi judicial, cloth-

ing the Commission with authority to ascertain facts based upon which findings the Commission may declare the application of the legislative rule requiring that service be reasonable and that rates be reasonable, then there is perhaps no objection to the Oregon Act upon the ground stated. If, however, it shall be held that the order made by the Commission is conclusive upon the courts, and that its decision is final both as to whether or not a rate is or is not reasonable, or as to whether or not an order is or is not reasonable, and that the provision for judicial review is merely in furtherance of its rate-making power, and that under this there can be no review of the questions of fact, and then only in the state court, with a right to resume jurisdiction in the Commission—the moment any evidence is introduced by the complainants in the state court, then it necessarily follows that the Commission Act is void not only because it fails to provide for judicial review, but it deprives the carrier of that constitutional right, if so construed, or limits its right to litigate the question in the state court, contrary to constitutional guaranties.

To determine whether the bill of complaint is sufficient as against a demurrer, the general rule is that if the allegations state ultimate facts the

complaint will be deemed sufficient without requiring a detailed statement of particular facts from which the ultimate facts are to be found, nor do we think the court should sustain the special demurrers even though the court should be of the opinion that the Railroad Commission Act under consideration is valid and is not unconstitutional. It is always proper, having in mind the general aspect of a bill of complaint in equity, to state in apt and appropriate terms matters which when considered by themselves may be considered to be more or less conclusions of law, but which when read in connection with substantive averments of fact applicable to the entire frame work of the bill such averments are relevant and pertinent, and the demurrer to the same ought not to be and will not be sustained.

In *Allen v. O'Donald*, 23 Federal 573, DEADY, Judge, says at p. 576 :

"The further point made in support of the third exception, that the matter excepted to is a mere conclusion of law, is not well taken. It is sometimes proper and convenient in equity pleading, as a means of indicating the relief to which the party considers himself entitled, or the defense sought to be

made, to make deductions from the facts stated that are more or less conclusions of law; and this seems to be the character of this allegation."

In *St. Louis v. Knapp Company*, 104 U. S. 658-660, Mr. Justice HARLAN, speaking for the court, says at p. 660:

"We are of opinion that the demurrer should have been overruled, and the defendant required to answer. The bill makes a *prima facie* case, not only of the right of the city to bring the suit, but for granting the relief asked. * * * This is not, as ruled by the Circuit Court, merely the expression of an opinion or apprehension upon the part of the city, but a sufficiently certain, though general, statement of the essential ultimate facts upon which the complainant rests its claim for relief. It was not necessary, in such a case, to aver all the minute circumstances which may be proven in support of the general statement or charge in the bill. While the allegations might have been more extended, without departing from correct rules of pleading, they distinctly apprise the defense of the precise case it is required to meet. There are some cases in which the same decisive and categorical

certainty is required in a bill in equity as in a declaration at common law. *Cooper, Eq. Pl. 5.* But, in most cases, general certainty is sufficient in pleadings in equity. *Story, Eq., Pl., sects. 252, 253."*

See also *South & N. A. R. Co. v. Railroad Commission*, 171 Fed. 225.

It is a well settled rule in negligence cases that a complaint which states the ultimate facts states a good cause of action.

See *Cederson v. Oregon Navigation Co.*, 38 Ore. 343.

See also *State ex rel. Railroad Commissioners et al. v. Sea Board Air Line Railway*, 48 Fla. 129-146.

In *Wallace v. Ark. Central R. Co.*, 118 Fed. 422, Circuit Court of Appeals, Eighth Circuit, speaking by THAYER, Circuit Court Judge, says at p. 424:

"It is obvious, we think, that no relief can be afforded to the appellants in this court, whether the action of the lower court upon the demurrer to the fifth and tenth paragraphs of the bill was erroneous or otherwise. Both the original and substituted bills contained a specific allegation that the tariff schedule which had been put in force by the Commission, and made effective as of August 2, 1900, would reduce

the complainant's earnings to such an extent as would amount to a taking of its property for public use without just compensation. It was averred in that paragraph of the bill that such would be the effect of the proposed schedule, because the income which the complainant was at the time deriving from all sources, by the use of its property, was not sufficient, under the existing schedule of rates, to enable the company to pay its operating expenses, taxes, and fixed charges, and that the proposed schedule of rates would yield far less than the existing schedule. In view of the action taken by the defendants when their demurrer to the fifth and tenth paragraphs of the bill was overruled, these allegations stood confessed; and, such being the case, the decree of the lower court was clearly right under repeated decisions of the supreme court of the United States holding that a state law or regulation establishing rates for the transportation of persons or property, such as will not admit of the carrier earning such a compensation as under all the circumstances of the case is just to it and the public, operates to deprive the company of its property without due process of law, and to deny to it the equal protection of the law, in violation of the fourteenth

amendment to the federal constitution. *Smyth v. Ames*, 169 U. S. 466, 522, 523, 18 Sup. Ct. 418, 42 L. Ed. 819; *Reagan v. Trust Co.* 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014."

To the same effect is *Houston & T. C. R. Co. v. Storey*, 149 Fed. 499-501.

In *South & N. A. R. Co. v. Railroad Commission of Alabama*, 171 Fed. 225, the Circuit Court speaking by JONES, District Judge, says :

"So many difficult and intricate questions of law and fact are involved in suits attacking freight and passenger rates upon constitutional grounds that it has become the custom of the pleader in this class of bills not only to state enough of the facts to show that the allegations as to the rates being unreasonable or confiscatory are not mere conclusions of the pleader as distinguished from allegations of fact, but to go quite beyond that, and to allege many facts and circumstances which, strictly speaking, are merely evidential or argumentative, in support of the contentions of the complainant, and to meet what may be offered in opposition to them, such as the facts going to show the value of the property devoted to the public use, the justice of the carrier's methods of transacting business, the

fairness of their accounts of expenditures and disbursements, the reasonableness of the rates charged, the gross and net earnings, the volume of domestic and interstate earnings, how they are derived and apportioned respectively, and the like. Frequently the pleader dwells upon particular results and phases of the practical operation of the rate statutes upon the carrier's business, as conducted under existing conditions. Sometimes the pleader sets forth, as illustrative of his claim as to the true interpretation and construction of the statutes, the "purpose" of the legislation, meaning the intent as gathered from the language of the statutes, and the conditions with which they deal. Strictly speaking, all this is objectionable, under the ordinary rule of good pleading, as, in legal effect, it is only setting out *in extenso* in the bills mere argument or evidence to prove the proper construction of the statutes. Yet such allegations foreshadow the principal contentions of law and fact and the numerous issues which arise on the proof, which must enter into the taking and stating of the accounts, in which all the issues are finally centered. Such methods of outlining the several issues and giving notice of them in advance are promotive of fairness and serve a most useful

purpose in lightening the labors of the court and counsel. For these reasons the courts of late have shown a marked tendency to relax the ordinary rules regarding impertinence, and to permit a latitude of allegation in bills of this sort, which is not allowed in other cases, where the material issues are far fewer in number and of a much simpler nature."

The authority of the Railroad Commission to make an order promulgating rates for future guidance is derived from the Legislature. It is a delegated authority of an administrative character and in derogation of the property rights of the carrier, and in derogation of the common law. It is not a power to manage or operate the properties as the Commission may deem advisable, nor is it the power to take charge of the rate making functions which still remain with the carrier. It is merely the power of regulation and supervision and control, subordinate to fundamental constitutional guaranties. The property of the carrier remains private property clothed with all the essential rights of private property, but the uses are public, and in so far as the Legislature has authorized these uses to be supervised and regulated the authority of the Commission may be

conceded as within the constitutional power of the state. But the moment that the Railroad Commission under this, or any other statute usurps the functions of management and practical ownership of these properties and ceases to exercise merely supervisory and regulative authority the statute, if so construed, would be void. It is not within the power of any Legislative tribunal, without appropriation of this property and without the assumption of ownership by the state, to foreclose the right of the owner to a judicial hearing as to the reasonableness of any rate or order, or any body of rates, and this without regard to the question as to whether or not the income from such rates would be sufficient to avoid charge of confiscation in whole or in part. *The power to regulate is neither the power to destroy nor the power to manage*, nor can the Commission exercise a discretion in determination of questions of fact which might seem to justify a particular rate independently of the question whether or not such rate is or is not reasonable. This was the vital weakness in the order made by the Interstate Commerce Commission under review in *Southern Pacific Co. and Oregon & California Railroad Co. v. Interstate Commerce Commission*, 219

U. S. 433, where Mr. Chief Justice WHITE, speaking for the court, says at p. 443:

"That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which, in and of itself, in a legal sense, might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so, or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for the service rendered. On the other hand, the Commission, in the argument at bar, does not contend that it possessed the indeed abnormal and extraordinary power which the railroads thus say was exerted in rendering the order complained of—a power which, if it obtained, would open a vast field for the exercise of discretion, to the destruction of *rights of private property in railroads*, and would in effect assert public ownership without any of the responsibilities which ownership would imply."

X

The provisions of the Railroad Commission Act of Oregon, that rates fixed and ordered substituted by the Railroad Commission, in lieu of rates found by them to be unreasonable or unjustly discriminatory shall be observed and followed in the future indefinitely, or until fixed anew, on complaint made, or on their own motion, is inequitable, and in violation of the Fourteenth Amendment of the Federal Constitution, providing that, "No state shall deny to any person within its jurisdiction the equal protection of the laws."

Village of Saratoga Springs v. Gas Co., 191 N. Y. 123.

This section provides that the rates fixed and ordered substituted by the Railroad Commission, in lieu of the rates found by them to be unreasonable and unjustly discriminatory, shall be observed and followed in the future indefinitely, or until fixed anew on complaint made, or on their own motion. The latter part of Section 28 of the Railroad Commission Act provides that: "This section shall be construed to permit any railroad to make complaint with like effect as though made by any person, firm, corporation,

or association, mercantile, agricultural or manufacturing society, body politic or municipal organization." But there is no provision in this section or anywhere in the Railroad Commission Act, giving a railway company the right to make a complaint to the Railroad Commission, that the rates established by the Commission are unreasonable, or unjustly discriminatory, or unfair to the railway company. In other words, if the Railroad Commission, after investigation, finds that the rate, or rates, fares, charges, or classifications fixed by the railway company are unreasonable, or unjustly discriminatory, the Commission has the power, to substitute therefore a rate or rates, charges, fares, or classifications, as it shall have determined to be just and reasonable, and the rate, rates, fares, charges, and classifications thus fixed by the Commission must be followed in the future by the railway company.

It will be seen, therefore, that this Act, while it provides a remedy for the shipper against rates which are unreasonable or unjustly discriminatory, denies to the railway company the right to make any complaint to the Commission, that rates established by the Commission are unjust or unreasonable. This act gives the right to

the shippers to file a complaint against the railway company before the Railroad Commission, while the railway company is compelled to go to the courts for redress. In this respect it is in conflict with the Fourteenth Amendment of the Federal Constitution in that it deprives the railway company of the equal protection of the laws.

It cannot be said that the Railroad Commission Act, which gives the right to have the rates of a railway company reduced to reasonable rates, on complaint being made to the Commission against the railway company, and makes no provision whatever authorizing the railway company to have the rates fixed by the Railroad Commission increased to a reasonable rate, upon complaint made by the railway company to the Commission, affords the equal protection to the public and the railway company. True, the Railroad Commission Act provides that if any railroad interested in, or affected by, any order of the Commission fixing any rate or rates, be dissatisfied therewith, it may commence suit in the Circuit Court of Marion County, Oregon, against the Commission, to vacate and set aside any such order on the ground that the rate or rates prescribed or fixed by the Railroad Commission are unreasonable and unjust.

But in this Act there is no provision giving to the railway company the right to apply to the Commission in the first instance, and if it files suit to set aside the order made by the Railroad Commission, it does so at the peril of being subjected to the payment of a penalty of not more than \$10,000 nor less than \$100.00, for neglecting to obey the order of the Commission. Sending a railway company to a statute handicapped by such penalties is a vivid illustration of "keeping the word of promise to the ear and breaking it to the hope." It is submitted that this Act is clearly a violation of the Constitutional right of appellants to the equal protection of the law.

It is respectfully submitted that the order of the Circuit Court sustaining the demurrers to the bill of complaint, and the decree dismissing the bill, should be reversed.

MAXWELL EVARTS,
WM. F. HERRIN,
WM. D. FENTON,
JAMES E. FENTON,
Of Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

No. 784

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY,

Appellants,

v.

THOMAS K. CAMPBELL, CLYDE B. AITCHISON and FRANK J. MILLER, Commissioners constituting "RAILROAD COMMISSION OF OREGON," and A. M. CRAWFORD, Attorney General of the State of Oregon,

Appellees.

BRIEF FOR APPELLEES

Appeal from the Circuit Court of the United States for the District of Oregon

STATEMENT

At the outset it may be stated that this cause presents many of the same questions which are presented in Oregon Railroad & Navigation Company v. these defendants and appellees, *et al.*, No. 424, which is assigned for hearing at the same time with this case. The similarity in issues involves a necessary duplication of the line of argument in

certain particulars, if each case is to be presented in independent briefs. There are, however, some important differences between this case and the Navigation Company case which will appear in the argument.

This case is an appeal from a decree of the Circuit Court of the United States for the District of Oregon, dismissing the bill of complaint of Southern Pacific Company and Oregon & California Railroad Company v. Thomas K. Campbell, Clyde B. Atchison and Frank J. Miller, constituting "Railroad Commission of Oregon," and A. M. Crawford, Attorney General of the state of Oregon.

The bill and amended bill challenged the constitutionality of the act of the Legislative Assembly of the state of Oregon creating the Railroad Commission of Oregon, the powers granted the Commission under said act, and the validity of an order of the Commission prescribing certain class rates charged for the transportation of commodities thereunder over the lines of appellants, Southern Pacific Company and Oregon & California Railroad Company, between Portland, Oregon, and other points and places within the state of Oregon.

The Oregon & California Railroad Company, one of the appellants, holds the legal title to and owns the lines of railway in question. All of its stock is owned by appellant Southern Pacific Company, and its lines of railway are operated by the latter under a lease.

The lines of the Oregon & California Railroad

Company lie wholly within the state of Oregon, but are operated as a part of the Southern Pacific system. The Oregon & California Railroad Company owns about 670 miles of main and branch lines of track within the state. The lines in question, over which freight moves, and to which the order of the Railroad Commission, which is attacked, applies, are as follows:

Main line—

Portland, Oregon, to the southern boundary of the state.

Branches—

Portland (Jefferson street) to St. Joseph, Oregon.

Portland (Park street) to Corvallis, Oregon, and seven other branches, which need not be enumerated.

This railroad has physical connections with other railway lines operated by the Southern Pacific at the Oregon-California boundary line; and also connections at Portland, Oregon, with the Union Pacific Railway system and other railway systems extending to other states. Intrastate and interstate commerce is carried on over said lines of railway by appellants.

The bill prayed a temporary restraining order pending the hearing and that upon final hearing a perpetual injunction be issued enjoining defendants from attempting to enforce the order, or to prosecute any suits, etc., and that the order be set aside, and that the Railroad Commission act be declared to be invalid, and for other relief therein set out.

General and special demurrers were interposed to the bill, which were sustained by the Court below and the decree dismissing the bill now appealed from, was rendered.

The Railroad Commission of Oregon was created by the act of the Legislative Assembly of the state of Oregon in the year 1907, (Rec. 4, par. V) known as Laws of 1907, chapter 53. A copy of the act as originally passed is set out as an exhibit on pages 111 to 160 of the Record in Oregon Railroad & Navigation Company v. these appellees, No. 424, which is assigned for hearing on the same day as this cause.

Under the provisions of this act an investigation on the Commission's own motion was made of the class rates in effect over and on the appellant Southern Pacific Company's main and branch lines between Portland, Oregon, and other points and places in said state. The rates investigated appear with others in the tariff of appellant effective October 9, 1909, No. 235-A, O. R. C. No. 434, with supplements amendatory thereof. (Rec. 6).

After due hearing and investigation, in which the appellant Southern Pacific Company appeared and participated, the Commission found certain of the class rates named in said tariff, over the lines of appellant within the state of Oregon, between Portland and other points and places in said state, unjust, unreasonable and excessive. The Commission also found said rates to be unjustly discriminatory as against the several stations and localities

enumerated in the order, and unjustly discriminatory as between the various classes of commodities taking class rates according to the western classification No. 48 (Rec. 16). In accordance with this determination, on September 21, 1910, it condemned certain of the existing rates, and by order duly made and entered fixed class rates which it determined to be just and reasonable and not discriminatory, to be charged thereafter for such transportation. The rates ordered were generally somewhat lower than those in effect, although, as will appear by an examination of the findings, many rates were not disturbed. The order was duly served and appellant given twenty days after the service thereof to comply therewith (Rec. 25).

Thereafter, on October 12, 1910, appellants filed the bill of complaint in the Court below, and a temporary restraining order was issued restraining said order from going into effect on the date fixed.

Appellees appeared as by order of the Court required to show cause why a preliminary injunction should not be granted and proof was submitted by both parties thereon. Appellees also filed a general and special demurrer to the bill. After a hearing before three judges as by law required a preliminary injunction was denied. On July 3, 1911, the court below sustained the demurrers and allowed appellants 30 days from the date thereof within which to file an amended bill of complaint (Rec. 53; 189 Fed. 182).

No amendment to the bill being filed, on the 18th day of July, 1911, counsel for appellants appeared

in open court and stated that appellants did not desire to plead further in said cause, whereupon an order was entered by the court sustaining said demurrers and dismissing the bill (Rec. 59).

On July 28, 1911, a petition for appeal to this court was filed (Rec. 60) and the appeal was allowed and perfected.

As this cause was heard and determined on bill and demurrers, a statement of the allegations of the bill in some detail is necessary to disclose the issues sought to be tendered.

ALLEGATIONS OF BILL OF COMPLAINT.

Paragraphs I to VI inclusive of the bill are the introductory portions, and set out the organization of the complainants, certain jurisdictional facts, the lines operated within Oregon, the creation of the Railroad Commission and the official positions of the defendants (Rec., pp. 2 to 5).

Paragraph VII sets out, *in haec verba*, section 57 of the Railroad Commission act and that on September 21, 1910, pursuant to an investigation upon its own initiative the Commission "pretending to observe and follow the said Railroad Commission Act" made the order complained of, which is then set out in full in the bill (Rec., pp. 5 to 25).

We set out so much of the order as we deem material for the purpose of this argument, calling attention, however, specifically to that portion we omit covering the rates condemned (Rec., pp. 7 to 15), and the rates established (Rec., pp. 17 to 24), as they consist of lengthy tabulations. (*Italics our own; caption omitted*).

THE ORDER ATTACKED.

"Now on this 21st day of September, 1910, the above entitled matter comes on before the Commission for final determination, due notice of hearing having been given said Southern Pacific Company and said Company having been furnished with a statement setting forth the rates investigated, and hearing having been duly had. And the Commission having considered the testimony and proofs taken and the argument of counsel, and being fully advised in the premises, finds:

"1. That the said Southern Pacific Company is a corporation organized under and existing by virtue of the laws of the state of Kentucky, and is a common carrier engaged in the transportation of persons and property by railroad between the following points in the state of Oregon, to-wit: [naming the main and branch lines]. That as such common carrier said Southern Pacific Company is subject to the provisions of chapter 53 of the Laws of Oregon for the year 1907 and acts amendatory thereof and supplemental thereto.

"2. That the said Southern Pacific Company maintains freight stations in the city of Portland known as Portland (Park Street), East Portland and Portland (Jefferson Street).

"3. That the said Southern Pacific Company imposes and charges for the intrastate transportation of freight in carloads and less than carloads, between Portland (Park St.), East Portland and Portland (Jefferson St.), Oregon, and other points upon its said lines of railroad within the state of Oregon, the several class rates hereinafter set forth which

govern the *intrastate transportation of freight* between such stations in Portland and said other stations hereinafter named taking class according to section 1 of said Southern Pacific Company's Local and Joint Freight Tariff No. 235-A, issued September 1, 1909, and effective October 9, 1909, O. R. C. No. 434, with its effective supplements. The classification of freight taking class rates is determined by the classification filed by said Southern Pacific Company with said Railroad Commission of Oregon known as The Western Classification No. 48, together with its supplements and reissues, and also by the exception to said Classification No. 48, being a reissue of the Western Classification No. 47 and its supplements described in the original statement herein. Said class rates are as follows: [Here follows table of rates condemned by the Commission].

"4. *That the above enumerated class rates are and each of them is unjust, unreasonable and excessive.*

Said Southern Pacific Company also makes and charges in a similar manner numerous other class rates which are fully set out in the said tariff No. 235-A, O. R. C. No. 434, with its effective supplements.

"5. *That the aforesaid class rates are not arranged upon any uniform or approximately uniform relationship as to each other, and that in consequence thereof the aforesaid rates are unjustly discriminatory as against the several stations and localities above enumerated, and are unjustly discriminatory as between the various classes of commodities taking class rates according to the said Western Classification No. 48.*

"6. That *just and reasonable and non-discriminatory charges* for said Southern Pacific Company to charge, collect and impose in the future in lieu of those hereinafter found to be unjust and unreasonable, are the following: [Here follows table of rates prescribed].

"IT IS THEREFORE ORDERED, CONSIDERED AND DETERMINED, that the said Southern Pacific Company shall cease and desist from charging, imposing and collecting for the *intrastate* transportation of freight taking class rates under the provisions of The Western Classification and under the exceptions to said Classification aforesaid, the several rates set out in paragraph 3 hereof, which rates are now charged, collected and imposed by said Southern Pacific Company, and in lieu thereof shall in future charge, collect and impose the several rates respectively set forth in paragraph 6 hereof, and shall make the necessary changes in its tariffs and file the same with the Commission on or before twenty days from the date of service of a copy of this order upon it.

Nothing in this order contained shall be construed to apply to interstate commerce being carried on by said Southern Pacific Company over any of the lines of railroad aforesaid."

Paragraph VIII of the bill contains a statement covering the jurisdictional facts as to the amount involved and the basis generally on which the injunction is prayed for (Rec. 25).

Paragraph IX sets forth facts showing how various railroad systems terminating or having connections that terminate in Portland, Oregon, name

rates over the lines of the Southern Pacific Company to points on its lines in Oregon, and alleges generally that rates to points on its lines in Oregon are made by a combination of the through rate to Portland plus its local rates from Portland to points of destination in Oregon. The paragraph also names a large number of tariffs making rates from other states over the Southern Pacific Company's lines to points in Oregon. It is also alleged that rates from water points in California to points in Oregon on its lines are generally the combination of the ocean competitive rate to Portland and the local class rates out of Portland to destination, as shown in tariffs filed with the Interstate Commerce Commission for interstate use. A number of illustrations are given of particular rates and combinations of rates and of the effect on a through rate if the changes made by the order of the Commission be allowed to go into effect, it being alleged by reason of the method of the rate making adopted by the complainants that the result of the change would materially affect and necessarily reduce interstate rates. It is alleged that these tariffs are filed with the Interstate Commerce Commission and are required to be observed by law. All of said tariffs are by reference made part of the bill and the court is asked to take judicial notice thereof (Rec., pp. 25 to 33).

Paragraph X sets out the capital stock and bonded indebtedness of Oregon & California Railroad Company and the amount still due the Southern Pacific

Company for advances made under its lease of said company's properties, and also set out certain of the terms of the lease.

It is also alleged that under existing tariffs the rates do not yield any net revenues from which any dividend can be paid upon the capital stock or any part thereof. The bill also refers to the deficits of the past years, and alleges that the complainants are entitled to earn enough to pay 6 per cent upon the floating indebtedness of the company, 5 per cent upon the bonded indebtedness, 7 per cent upon the preferred stock, and 6 per cent upon the common stock of the company.

The gross earnings and expenditures from the years 1902 to 1909, inclusive, are set forth; also the division of the operating revenues between inter- and intrastate business and the amount the company claims it will lose per annum under the order if the same be permitted to go into effect, \$120,859.32 upon *intrastate* business, and \$156,072.48 upon *interstate* business affected by the order, a total of \$276,931.80. (That there is an admitted error in this amount is pointed out later in this argument).

It is alleged that the tariffs previously in effect afforded complainants "but slight compensation above the cost of service," and the order if enforced will deprive them of large annual revenues and compel them to give the use of their properties without reasonable or just compensation, and will deprive them of their properties without any reason-

able compensation, and will require them to increase other rates upon traffic not affected by the order, and particularly upon the products of the soil; and will require them to discriminate against such last named products to the great injury of complainants and of the public.

It is also alleged that the largest decreases in the class rates affect classes 4 and 5, which consist largely of staples, particularly groceries and hardware, and that the only benefit from said decrease would be to jobbers and dealers in these products, who are now making large and excessive profits (Rec., pp. 33 to 37).

Paragraph XI describes the railways of complainants in Oregon. From this it appears that for a portion of the way south of Portland they have and operate on both sides of the Willamette river two substantially competitive lines of railway, both of which compete with the Willamette river; that other railroads are building in the same territory, and that the country is difficult and expensive in which to operate and maintain railroads. It is alleged the less carload merchandise tonnage received at points on the lines of the Southern Pacific in Oregon for one year is 99,264 tons, yielding a revenue of \$777,984, all of which will be directly affected by the order; and that there is approximately in one year's business 15,203 tons of carload commodities yielding a revenue of \$210,888.82 that will also be affected by said order, or a total of 115,467 tons yielding a revenue of \$1,088,872.82,

or about 39 per cent of the total tonnage and 74 per cent of the total revenues, the whole of which is upon freight received; that the total freight revenue for the year ended June 30, 1909, was \$3,490,042.58, of which \$1,088,872.82 was revenue derived from freight received affected by the application of class rates, amounting to 30 per cent of the total freight revenue of the complainants. (Rec., pp. 37 (Rec., pp. 39 and 40).

Paragraph XII sets forth the fact that the Oregon & California Railroad Company was incorporated under the laws of the state of Oregon on March 16, 1870, and that under the Constitution of Oregon, and section 34 of the act of its Legislative Assembly, approved October 14, 1862, the Company has the power to collect and receive such tolls or freights for transportation of persons or property as it may prescribe, and that by virtue of its articles of incorporation and of the Constitution and of the law it has become vested with the right to collect and receive such tolls on freight as it may prescribe, and that the Southern Pacific Company by virtue of its lease succeeded to all the franchises and rights of the Oregon & California Railroad Company and has the same power; that the order in question impairs these vested rights and is in violation of the state and federal Constitutions. (Rec., pp. 39 and 40).

Paragraph XIII alleges that no adequate or proper remedy has been given or provided for the protection of complainants against the unjust or

unlawful enforcement of the order in question, and sets out section 51 of the Railroad Commission act, and section 33 thereof as amended February 23, 1909, and alleges the lack of remedy to protect their property; that they are subject to excessive penalties and are denied the equal protection of the law. This paragraph also sets out section 1 of article III of the Constitution of Oregon, providing for the division of the powers of the government into the three departments and sets forth various ways in which it is alleged this section of the Constitution is violated by the Commission act. (Rec., pp. 40 to 42).

Paragraph XIV alleges that the defendants are threatening to institute proceedings against complainants and to compel enforcement of the order, and if not enjoined complainants will be compelled to observe and put into effect the rates prescribed or have their property confiscated to the use of the public in excess of about \$300,000 per annum, and will be required to put in rates affecting interstate traffic contrary to the federal Act to Regulate Commerce, and that penalties and fines will be imposed to such an extent as to confiscate complainants' property to their great loss, etc. (Rec., pp. 42 and 43).

Paragraph XV sets forth the various conclusions of law drawn by the pleader upon which the court is asked to declare the Railroad Commission act and the order null and void, which summarized are as follows:

A. Complainants' property will be taken for private use without just or any compensation and without their consent, in violation of section 18, article I, of the Constitution of Oregon, and the enforcement of the order will not enable complainants to receive a just and fair return upon their property.

B-C. The act attempts to confer executive, legislative and judicial powers upon the Railroad Commission of Oregon, and the Commission in the proceedings before it exercised judicial functions, and in making the order, exercised legislative and judicial functions, in violation of section 1, article III of the Constitution of Oregon.

D. The act violates section 21, article I of the Constitution of Oregon, which provides that "No *ex post facto* law, or law impairing the obligations of contracts, shall ever be passed, nor shall any law be passed the taking effect of which shall be made to depend upon any authority except as provided in this Constitution," etc.

E. The act also violates said section in that it provides the Railroad Commission shall exercise authority, which when exercised shall take effect upon its own orders, and not by virtue of any law passed by the Legislative Assembly.

F. The act violates section 1 of article VII of the Constitution of Oregon in that it provides that all proceedings involving orders of the Commission must be brought in the Circuit Court of the State of Oregon for Marion County, and it also violates

the Federal Constitution in that by reason of said provision complainants are denied the equal protection of the laws and are deprived of the right to litigate their cause of suit in the courts of the United States; and that it deprives complainants of their property without due process of law.

G. The act violates section 8, paragraph 3, article I, of the Constitution of the United States in that it attempts to confer upon the Railroad Commission of Oregon jurisdiction over interstate commerce.

H. The order violates section 8, paragraphs 3 and 18, article I, of the Constitution of the United States, and is in conflict with the act of February 4, 1887, entitled "An act to regulate commerce," and amendments thereto, in that it directly, materially and substantially affects rates upon interstate shipments.

I. The act is repugnant to section 10, article I, of the Constitution of the United States, in that it is violative of the contract rights of the complainants under the articles of incorporation of the Oregon & California Railroad Company, and its predecessors in interest, inasmuch as it was provided by section 34 of the act of the Legislative Assembly, approved October 14, 1862, that every corporation formed under the act for the construction of a railroad as to such roads "shall be deemed common carriers and shall have power to collect and receive such tolls or profit for transportation of persons or property thereon as it may prescribe."

J. The order is void because the reduction of the class rates in question is based upon an arbitrary approval of class 1 now in effect, and upon an arbitrary spread between the classes, which classification and spread were adopted arbitrarily and without a reference to the distance such traffic should be moved by the carrier or to the nature or character of the traffic or to the service to be performed or to the compensation that should be paid therefor, and will make the largest reduction effective at points where operation is most expensive and difficult.

K. The order is void in this, that rates prescribed by said order in lieu of existing rates are confiscatory of the property of complainants and will deprive complainants of their property without compensation and without due process of law. (Rec., pp. 43 to 47).

Paragraph XVI contains the prayer of the bill, that the Railroad Commission act, and the order made by the Commission, be set aside, and that defendants be restrained permanently from enforcing any of the provisions either of the act or of the order against complainants. (Rec., pp. 47 and 48).

The Oregon Railroad Commission Act, as in effect when suit was brought, is made a part of the bill by reference, and appellants pray that it and the amendments thereto may be taken as part of the bill as though fully embodied therein. The act, however, is not printed in the record. To save the court time and trouble, certain salient portions thereof are set out in this brief.

As the Supreme Court of Oregon has held the act to be not in violation of the State Constitution, we set out only the controlling provisions thereof as far as they may pertain to this controversy.

SYNOPSIS OF OREGON RAILROAD COMMISSION ACT.

COMMISSION CREATED.

It creates a Railroad Commission, composed of three persons elected by the people. Section 1. Lord's Oregon Laws, Sec. 6785.

NAME OF COMMISSION, ETC.

The commissioners shall be known collectively as "Railroad Commission of Oregon," and in that name may sue and be sued, etc. Section 7. L. O. L. Sec. 6681.

WHAT EMBRACED IN TERM "RAILROAD"—WHAT TRANSPORTATION GOVERNED BY ACT.

"The term railroad, as used herein, shall mean and embrace all corporations, companies, * * * that now, or may hereafter, own, operate by steam, electric or other motive power, manage or control, any railroad or interurban railroad, or part of a railroad or interurban railroad as a common carrier in this state, or cars or other equipment used thereon, or bridges, terminals, or side tracks, used in connection therewith, whether owned or operated under a contract, agreement or lease or otherwise. * * * The provisions of this act shall apply to the transportation of passengers and property, and to all railroad companies, etc., that shall do business as common carriers upon or over any line of railroad within this state." Section 11. L. O. L. Sec. 6686.

**REASONABLY ADEQUATE SERVICE, ETC., EXACTED—
CHARGES TO BE REASONABLE AND JUST.**

Every railroad is required to furnish reasonably adequate service, equipment and facilities, and the charges made for any service rendered or to be rendered in the transportation of passengers or property or for any service in connection therewith, * * * shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. Section 12. L. O. L. Sec. 6887.

**SCHEDULE OF RATES AND JOINT RATES TO BE PRINTED
AND KEPT ON FILE.**

Every railroad is required to print and file with the Commission a schedule of its rates and joint rates existing between all points in this state upon its lines, or any line controlled or operated by it. Section 13. L. O. L. Sec. 6888.

**CHANGES IN SCHEDULE ONLY ON NOTICE—FILING
NEW COPIES PRIOR TO CHANGE.**

Changes in schedules are to be made only upon notice and filing of copies of new schedules with the Commission. Section 14. L. O. L. Sec. 6889.

**UNLAWFUL TO TAKE OTHER COMPENSATION, ETC.,
THAN SPECIFIED IN SCHEDULES.**

"It shall be unlawful for any railroad to charge, demand, collect or receive a greater or less compensation for the transportation of passengers or property or for any service in connection therewith than is specified in such

printed schedules, including schedules of joint rates, as may at the time be in force, and the rates, fares and charges named therein shall be the lawful rates, fares and charges until the same are changed as herein provided." Section 16. L. O. L. Sec. 6891.

BUT ONE UNIFORM CLASSIFICATION OF FREIGHT.

"There shall be but one classification of freight in the state, which shall be uniform on all railroads." Section 20. L. O. L. Sec. 6895.

**MANNER OF INVESTIGATION OF COMPLAINTS—INVESTIGATION ON COMMISSION'S OWN MOTION
—POWER TO ORDER CHANGES.**

"Upon complaint of any person, * * * that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property, or any service in connection therewith, are in any respect unreasonable or unjustly discriminatory, * * * the Commission may notify the railroad complained of that complaint has been made, and ten days after such notice has been given, the Commission may proceed to investigate the same as hereinafter provided. Before proceeding to make such investigation the commission shall give the railroad and the complainant ten days' notice of the time and place and when and where such matters will be considered and determined, and said parties shall be entitled to be heard and shall have process to enforce the attendance of witnesses. If upon such investi-

gation the rate or rates, fares, charges or classifications, or any joint rate or rates, or any regulation, practice or service complained of shall be found to be unreasonable or unjustly discriminatory, * * * the Commission shall have power to fix and order substituted therefor such rate or rates, fares, charges or classifications as it shall have determined to be just and reasonable and which shall be charged, imposed and followed in the future. * * *

"No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

*"Whenever the Commission shall believe that any rate or charges may be unreasonable or unjustly discriminatory, or that any service is inadequate, and that an investigation relating thereto should be made, it may on its own motion investigate the same. If, after making such investigation, the commission becomes satisfied that sufficient grounds exist to warrant a hearing ordered to determine whether the rate so investigated [is] unreasonable or unjustly discriminatory, * * * it shall furnish the railroad or railroads interested a statement setting forth the rate or service investigated, which said statement shall be accompanied by a notice fixing a time and place for hearing on such rate or service, as the case may be. Notice may likewise be given to other parties in interest, and shall be given at least ten days in advance of any hearing, and thereafter proceedings shall be had and conducted in reference to the matter investigated in like manner as though complaint was filed with the Commission relative to the matter investigated, pur-*

suant to the provisions of this section, and the same order or orders may be made in reference thereto as if such investigation had been made on complaint.

"This section shall be construed to permit any railroad to make complaint with like effect as though made by any person, firm, corporation or association, mercantile, agricultural or manufacturing society, body politic or municipal organization. * * *" Section 28. L. O. L. Sec. 6906.

SUBSTITUTIONS AND ENFORCEMENT OF RATES,
CHARGES, CLASSIFICATIONS, ETC.

"Whenever, upon an investigation made under the provisions of this act, the Commission shall find any existing rate or rates, fares, charges or classifications, or any joint rate or rates, or any regulation or practice whatsoever affecting the transportation of persons or property, or any service in connection therewith, *are unreasonable or unjustly discriminatory*, or any service is inadequate, it shall determine and by order fix a *reasonable rate*, fare, charge, *classification*, or joint rate to be imposed, observed, and followed in the future in lieu of that found to be unreasonable or unjustly discriminatory, or inadequate, as the case may be, and it shall cause a certified copy of each such order to be delivered to an officer or station agent of the railroad affected thereby, which order shall, of its own force, take effect and become operative twenty days after the service thereof. All railroads to which the order applies shall make such changes in their schedule on file as may be necessary to make the same

conform to said order, and no change shall thereafter be made by any railroad in any such rates, fares, or charges, or in any joint rate, or rates, without the approval of the Commission. * * *

"The Commission may, at any time, upon notice to the railroad, and after opportunity to be heard as provided in section 28, rescind, alter or amend any order fixing any rate or rates, fares, charges, or classification, or any other order made by the Commission, and certified copies of the same shall be served and take effect as herein provided for original orders." Section 30. L. O. L. Sec. 6908.

COMMISSION'S ORDERS IN FORCE AND PRIMA FACIE
REASONABLE UNTIL JUDICIALLY FOUND
OTHERWISE.

"All rates, fares, charges, classifications and joint rates fixed by the Commission shall be in force and shall be *prima facie* lawful, and all regulations, practices, and service prescribed by the Commission shall be in force and shall be *prima facie* reasonable, until finally found otherwise in an action brought for that purpose pursuant to the provisions of sections 32, 33, 34 and 35 of this act." Section 31. L. O. L. Sec. 6909.

PROCEEDINGS ON SUITS AGAINST SUBSTITUTED RATES.

"Any railroad * * * interested in or affected by any order of the Commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or service, being dissatisfied therewith, may commence a suit in the

Circuit Court of Marion County against the Commission as defendant to vacate and set aside any such order on the ground that the rate or rates * * * fixed in such order, are unlawful, or that any such regulation, practice or service prescribed or fixed in such order is unreasonable. * * * The commission shall serve and file its answer to said complaint within ten days after the service thereof, whereupon said suit shall be at issue and stand ready for trial upon ten days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in said court, and the Circuit Court shall always be deemed open for the trial thereof, and the same shall be tried and determined as a suit in equity.

"In all trials under this section, and sections 33, 34 and 35 thereof, the burden of proof [shall] be upon the plaintiff to show by clear and satisfactory evidence that the order of the Commission complained of is unlawful, or unreasonable, as the case may be." Section 32. L. O. L. Sec. 6910.

**INJUNCTION NOT TO ISSUE AGAINST COMMISSION'S
ORDER EXCEPT ON APPLICATION, NOTICE AND
HEARING—TERMS OF BOND.**

"After the commencement of such suit the Circuit Court may for cause shown, upon application to the Circuit Court or presiding judge thereof, and upon notice to the commission and hearing, suspend or stay the operation of the order of the Commission complained of until the final disposition of such suit, upon the giving of such bond or other security, and upon

such conditions as the court may require; and if such order of injunction suspends the order or requirement of the Commission fixing rates, then the court shall require a bond with a good and sufficient surety, conditioned that the railroad or railroads applying for such injunction shall answer for all damages caused by the delay in the enforcement of the order of the Commission and all compensation for whatever sums for transportation any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of the Commission had not been suspended; and such bond shall cover the periods transpiring from time of the issuance of any such injunction until the final determination of the question litigated. The said bond shall be executed in favor of the Railroad Commission of Oregon for the benefit of whom it may concern, and shall be enforceable by said Commission or any person interested, in an appropriate proceeding. Any person paying charges found to be excessive, shall have a claim for the excess whether paid under protest or not, and unless refunded within thirty days after written demand made after final judgment, may recover the same by action against such railroad, or such railroad and the sureties on such bond. Claims of persons for money collected in excess of the amount payable under the rate or rates established by the Commission shall be assignable in the same manner as any chose in action. No appeal to the Supreme Court shall stay the operation of any order of the Commission unless the Circuit or Supreme

Court shall so direct, and unless the railroad so appealing shall give a bond with like conditions and terms as that given on granting injunctions suspending an order of the Commission fixing rates." Section 33 as amended by Gen. Sess. Laws Or. 1909, p. 163. L. O. L. Sec. 6911.

RESUBMISSION TO COMMISSION WHEN EVIDENCE ON TRIAL DIFFERENT THAN BEFORE COMMISSION.

"If, upon the trial of such suit, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the Commission or additional thereto, the court before proceeding to render judgment, unless the parties to such suit stipulate in writing to the contrary, shall transmit a copy of such evidence to the Commission and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classification, joint rate or rates, regulation, practice, service or equipment complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

"If the Commission shall rescind its order complained of, the suit shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment or decree shall be rendered thereon, as though made by the Commission in the first instance. If the original order shall not

be rescinded or changed by the Commission, judgment shall be rendered upon such original order." Section 34. L. O. L. Sec. 6912.

APPEAL TO SUPREME COURT.

"Either party to said suit, within sixty days after the entry of the judgment or decree of the Circuit Court, may appeal to the Supreme Court. Where an appeal is taken the cause shall, on the return of the papers to the Supreme Court, be immediately placed on the calendar of the then pending term, and shall be assigned and brought to a hearing in the same manner as other causes on the calendar, but shall have precedence over civil cases of a different nature pending in said court." Section 35. L. O. L. Sec. 6913.

INVESTIGATION OF INTERSTATE RATES—PROCEEDINGS BEFORE INTERSTATE COMMERCE COMMISSION.

"The Commission shall have power, and it is hereby made its duty to investigate all freight rates on interstate traffic on railroads in this state, and when the same are, in the opinion of the Commission, excessive or discriminatory or are levied or laid in violation of the interstate commerce law, or in conflict with the rulings, orders or regulations of the Interstate Commerce Commission, the Commission shall present the facts to the railroad, with a request to make such changes as the Commission may advise, and if such changes are not made within a reasonable time the Commission shall apply by petition to the Interstate Commerce Commission for relief. All freight tariffs issued by any such railroad relating to interstate traffic in this state shall be filed in the

office of the Commission within thirty days after the passage and publication of this act and all such tariffs thereafter issued shall be filed with the Commission when issued." Section 47. L. O. L. Sec. 6925.

TREBLE DAMAGES TO INJURED PERSONS—ATTORNEY'S FEES.

"If any railroad shall do or cause to be done or permit to be done any matter, act or thing in this act prohibited, or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, such railroad shall be liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of such violation together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case; provided, that any recovery as in this section provided, shall in no manner affect a recovery by the state of the penalty prescribed for such violation. * * *" Section 51. L. O. L. Sec. 6934.

PENALTY FOR VIOLATION BY OFFICERS, AGENTS OR EMPLOYEES.

"Any officer, agent or employe of any railroad who shall fail or willfully refuse to fill out and return any blanks as required by this act, or shall fail or refuse to answer any questions therein propounded, or shall knowingly or willfully give a false answer to any such question, or shall evade the answer to any such question, where the fact inquired of is within

his knowledge, or who shall, upon proper demand, fail or willfully refuse to exhibit to the Commission or any Commissioner, or any person authorized to examine the same, any book, paper or account of such railroad, which is in his possession or under his control, shall be conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars for each such offense; and a penalty of not less than five hundred dollars nor more than one thousand dollars, shall be recovered from the railroad for each such offense when such officer, agent or employee acted in obedience to the direction, instruction or request of such railroad or any general officer thereof." Section 52, L. O. L. Sec. 6935.

**GENERAL PROVISION FOR PENALTY FOR VIOLATION BY
RAILROADS.**

"If any railroad shall violate any provision of this act, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it, for which a penalty has not been provided, or shall fail, neglect or refuse to obey any lawful requirement, order made by the Commission, or any judgment or decree made by any court upon its application, for every such violation, failure or refusal, such railroad shall forfeit and pay into the state treasury a sum of not less than one hundred dollars, nor more than ten thousand dollars, for such offense. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent, or other person acting for or employed by any railroad, acting within the scope of his em-

ployment, shall in every case be deemed to be the act, omission or failure of such railroad.

"All penalties, fines or forfeitures, or other sums collected or paid under the provisions of this act, shall be paid into the general fund of the state treasury, except where it is provided the same shall be paid to the aggrieved party." Section 53. L. O. L. Sec. 6936.

EMERGENCY RATES PERMITTED ON ORDER OF COMMISSION.

"The Commission shall have power when deemed by it necessary to prevent injury to the business or interests of the people or railroads of this state in consequence of interstate rate wars, or in case of any other emergency to be judged of by the Commission to temporarily alter, amend, or with the consent of the railroad company concerned, suspend any existing passenger rates, freight rates, schedules, and orders of any railroad or part of railroad in this state. Such rates so made by the Commission shall apply on one or more of the railroads in this state or any portion thereof as may be directed by the Commission, and shall take effect at such time and remain in force for such length of time as may be prescribed by the Commission." Section 54. L. O. L. Sec. 6937.

RATES, CHARGES AND PRACTICES NOT SPECIFICALLY DESIGNATED MAY BE PRESCRIBED.

"Whenever, after hearing and investigation as provided by this act, the Commission shall find that any charge, regulation, or practice affecting the transportation of passengers or property, or any service in connection therewith, not hereinbefore specifically designated,

is *unreasonable* or *unjustly discriminatory*, it shall have the power to regulate the same as provided in sections 28 and 30 of this act." Section 55. L. O. L. Sec. 6988.

INQUIRY INTO VIOLATIONS OF RAILROAD LAWS, ETC.

"The Commission shall inquire into any neglect or violation of the laws of this state by any railroad corporation doing business therein, or by the officers, agents, or employees thereof, or by any person operating a railroad, and shall have the power, and it shall be its duty, to enforce the provisions of this act as well as all other laws relating to railroads and report all violations thereof to the Attorney General; upon the request of the Commission it shall be the duty of the Attorney General or the prosecuting attorney of the proper county to aid in any investigation, hearing, or trial had under the provisions of this act, and to institute and prosecute all necessary actions or proceedings for the enforcement of this act or the recovery of penalties payable to the state, and of all other laws of this state relating to railroads, and for the punishment of all violations thereof. Any forfeiture or penalty herein provided shall be recovered by an action brought thereon in the name of the State of Oregon in any court of appropriate jurisdiction. * * *" Section 57. L. O. L. Sec. 6940.

ACTION OF COMMISSION TO BE VALID NOTWITHSTANDING TECHNICAL IRREGULARITY—LIBERAL CONSTRUCTION OF ACT.

"A substantial compliance with the requirements of this act shall be sufficient to give effect to all the rules, orders, acts and regulations

of the Commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto. The provisions of this act shall be liberally construed with a view to the public welfare, efficient transportation facilities, and substantial justice between shippers and passengers and railroads." Section 59. L. O. L. Sec. 6942.

RIGHTS OF ACTION NOT WAIVED BY THIS ACT.

"This act shall not have the effect to release or waive any right of action by the state or by any person for any right, penalty or forfeiture which may have arisen or which may hereafter arise under any law of this state; and all penalties and forfeiture accruing under this act shall be cumulative and a suit for, and recovery of, one shall not be a bar to the recovery of any other penalty." Section 60. L. O. L. Sec. 6943.

PREFERENCES AS TO LOCALITIES PROHIBITED.

"If any railroad, as the same is defined in section 6886 (L. O. L.), shall make or give an undue or unreasonable preference or advantage to any particular locality, or shall subject any particular locality to any undue, unreasonable prejudice or disadvantage in any respect whatsoever, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful; provided, this section shall not prohibit any railroad from giving necessary preference to live stock and perishable freight over other freight." L. 1909, c. 97, p. 158, Sec. 1; L. O. L. Sec. 6928).

COMMISSION TO REGULATE DISCRIMINATORY CHARGE
OR PRACTICE.

"Whenever, after hearing and investigation as provided by sections 6906, 6907 and 6908 (Lord's Oregon Laws) the Railroad Commission of Oregon shall find that any charge, regulation or practice affecting the transportation of passengers or property or any service in connection therewith is unjustly discriminatory against any locality, it shall have the power to regulate same as provided in said sections 6906, 6907 and 6908." (L. 1909, c. 97, p. 158, Sec. 2; L. O. L. Sec. 6929).

The various tariffs, which by reference are made a part of the complaint, do not appear in the record, but they are referred to on argument.

It will be observed there is no positive allegation of confiscation, nor are any facts alleged upon which confiscation could be predicted. All allegations of this character are qualified. Nor was there any test as to the actual workings of the rates or the effect of the order on the business or earnings of the appellants in advance of the filing of the bill.

DEMURRERS TO THE BILL.

To this bill of complaint defendants interposed demurrers (Rec. 49 to 53). The general demurrer was in the usual form and was based upon the following grounds:

1. "That it appears upon the face of the bill herein that the court has no jurisdiction of the subject-matter of the controversy between the parties.

2. "That it appears by the complainant's [complainants'] own showing by the said bill,

that it is [they are] not entitled to the relief prayed by the said bill against these defendants, or any of the defendants.

3. "That said complainant has [complainants have] not in and by its [their] said bill stated such a case as doth or ought to entitle it [them] to the relief, thereby sought and prayed for, from or against these defendants, or any of them.

4. "That it appears upon the face of the bill that the complainant has [complainants have] an adequate remedy at law."

Separate demurrers are directed to the following paragraphs of the bill: Paragraphs VIII and IX are demurred to on the following grounds:

1. "That it appears from the facts set forth in said paragraphs, and in each and all of them, that complainants are not entitled to the relief, or any part thereof, prayed for from or against these defendants, or any of them.

2. "That the facts as set out in said paragraph, and each of them, do not state a cause of suit, or any part of a cause of suit against these defendants, or any of said defendants."

A similar special demurrer was interposed to paragraphs X to XVI, both inclusive.

The demurrer was sustained and the motion of complainants for a preliminary injunction was denied. Complainants not desiring to plead further, the bill of complaint was dismissed (Rec., p. 59). Thereafter complainants appealed (Rec., p. 60).

The assignments of error are set out in the record, pages 61 to 64.

THE RECORD.

The printed record does not contain the law attacked, any tariffs or other documents referred to in the complaint, or any of the proceedings, orders, papers or exhibits filed on the hearings, save the complaint, demurrers, opinion of the court below, petition for appeal, etc.

As has been stated, the Railroad Commission Act of Oregon is attacked as being in contravention of the State Constitution. The order of the Commission is attacked on sundry grounds, which will be specifically referred to hereafter.

It is well, therefore, at the outset to have clearly in mind certain facts appearing on the face of the record.

1. There is no claim made of any jurisdictional defect in the proceedings before the Railroad Commission; it is not urged that appellants did not have notice or were not heard, or that full investigation was not made. Indeed, the bill of complaint in effect admits the Commission followed the provisions of the act. (Rec., p. 5, par. VII).

2. The Commission found that appellant Southern Pacific Company was violating the law in two particulars:

- A. Imposing and charging for the transportation of intrastate traffic unjust, unreasonable and excessive rates.

- B. Charging and exacting unjustly discriminatory rates as against places and localities and as between commodities.

Each of these acts is specifically condemned by law and it is the duty of the Commission to correct them when found to exist.

3. As required by law, the Commission, after notice, hearing and investigation, found and fixed just, reasonable and non-discriminatory charges to be charged in the future for those found unjust, unreasonable and unjustly discriminatory.

4. By the terms of the order itself, its operation was confined strictly to intrastate traffic and provided that nothing in the order should be construed to apply to interstate commerce being carried over any of the lines of the railroads involved.

So far as the order is concerned, therefore, there were two equally potent factors moving the Commission to action, the *unreasonableness* of the rates, and the *discriminations* being practiced.

QUESTIONS PRESENTED BY COMPLAINT.

A clear statement of the questions sought to be presented by appellants is set out in the opinion of the court below. It is as follows:

"First—The act of the legislature creating the Railroad Commission is unconstitutional and void, because (a) of the excessive penalties and burdens imposed for refusal to obey the orders of the Commission; (b) because its provisions are not uniform and equal in their application; (c) because it confers upon the Commission legislative, executive and judicial powers; (d) because rate making is a legislative function and a rate cannot be made to take effect upon the order of a subordinate commis-

sion; (e) because it requires a railroad company aggrieved by an order of the Commission to prosecute any suit to review the same in the state courts; (f) because it provides for a judicial review of the orders of the Commission.

Second—The order in question is violative of the Constitution of the United States because it directly and materially affects interstate commerce, since the rate on interstate traffic over complainants' lines in Oregon is made up by the through rate to Portland with the local rate out.

Third—The law under which the Oregon & California Railroad Company was incorporated provides that a corporation organized thereunder "shall have power to collect and receive such tolls and freights for transportation of persons and property as it may prescribe," and thus deprives the state of the power to fix rates for transportation of freight or passengers.

Fourth—The rates fixed by the Commission and sought to be enjoined in this suit are so unreasonably low as to amount to confiscation *pro tanto* of complainants' property.

Fifth—The order of the Commission was based upon an arbitrary approval of class 1 of rates then in force on complainants' line and an arbitrary spread between such class and other classes without any reference to the distance the traffic was to be carried, the character or nature of the service to be performed, or the compensation that should be paid therefor.

Seventh [Sixth]—That the rates prescribed by the Commission are unreasonable, and this court should review the same under the provisions of the Commission act." (Rec., p. 54).

An examination of the complaint will, it is believed, justify the statement that the real underlying basis of the suit, is the question now before this court for review from a number of circuits—the alleged interference with interstate commerce by state railroad commissions in establishing reasonable intrastate rates.

This statement is made because from a comparison of the rates fixed by the order with those in effect prior thereto it is apparent no radical changes were made, and the allegations of the bill coupled with the estimates of loss in revenue and statements filed with the circuit court absolutely negative anything that even squints at confiscation, and the points of law relied on it is believed have been definitely settled by this court and the supreme court of Oregon.

One notable fact appears to which the court's attention at this stage should be directed, and which does not appear in other cases of a similar nature before this court, to wit: the finding as to unjust discrimination. This finding is not met by the bill. No allegation attempts to negative it, and this breach of the law is even more abhorrent than the mere unreasonableness of a rate.

The real gravamen of the bill is that on account of the use of local rates by appellants in making interstate rates a reduction in the local rate works a like reduction in the interstate rate and hence is an interference with interstate commerce.

Certain of the questions will be determined by the court under the law; others as presented are mixed

questions of law and fact, and others presumptively deal with questions of fact. Whether the bill of complaint states facts necessary to maintain the issues attempted to be presented, or presents any real issues of fact, will be determined by an examination of the bill.

APPELLEES' CONTENTION.

Briefly stated, the contention of appellees, as representing the state of Oregon, is substantially as follows:

A. The power of the state in all matters affecting intrastate commerce is supreme, subject only to constitutional guaranties for the protection of property rights.

B. The state may pursue any desirable constitutional methods to effectuate this control. It may establish rates and regulations to be charged and enforced by common carriers in connection with intrastate traffic by the direct action of the legislature or through an administrative body.

C. The act of the legislative assembly creating the railroad commission of Oregon is, and the powers thereby granted are, constitutional.

D. The findings and conclusion of the commission in determining and fixing a reasonable rate to be charged in the future for the transportation of freight and condemning discriminations are not subject to review by the courts, except upon constitutional grounds.

E. In passing upon an order of the Commission fixing reasonable rates for the future or condemn-

ing unjust discriminations, a court will not substitute its judgment for that of the Commission as to the reasonableness of the rate in the ordinary meaning of the word, but passes on the question whether the rates fixed are unreasonable from a constitutional standpoint, i. e., confiscatory. When the Commission acts within the scope of its authority, the court will not review its acts or set aside its conclusion as to discriminatory acts and practices.

F. Appellants should pursue their remedy in the state courts before resorting to the injunctive process of the federal courts.

G. All presumptions are in favor of an order made by a duly authorized administrative tribunal.

H. No issuable fact is presented by mere general allegations as to the probable effect of the order, nor does a demurrer admit the truth of such allegations. To tender issues of fact a complaint must contain full, accurate, clear and distinct statements of ultimate facts.

I. The interference with interstate commerce that is to be condemned is a direct interference.

J. The statute and order regulate and attempt to regulate *intrastate* commerce only and do not unduly or unlawfully interfere with *interstate* commerce.

K. The alleged contract right of appellants to fix rates is subject to the police power of the state.

L. Irrespective of the reasonableness of the rates, the unchallenged finding that the rates are unjustly discriminatory is sufficient to support the order.

POINTS OF LAW—AUTHORITIES AND ARGUMENT

THE RAILROAD COMMISSION ACT NOT IN CONFLICT WITH THE CONSTITUTION OF THE STATE OF OREGON.

It will be noted that a number of the grounds of error in Assignment V (Rec. p. 61) attack the railroad commission act as being in conflict with the constitution of Oregon. They are subdivisions (b), (c), (d), (e), (f), (i).

This question is no longer open, as the constitutionality of the act in question has been directly sustained by the supreme court of Oregon since the appeal was taken in the case at bar.

State v. Corvallis & Eastern R. Co., — Or. —, 117 Pac. 980.

This was an appeal from a judgment imposing a penalty for failure to comply with an order of the railroad commission for the erection of a depot and the installation of an agent. Defendant demurred, on the ground that the railroad commission Act unconstitutionally intermingled the several powers of the government. The supreme court of Oregon held the Act did not contravene the provisions of Article III, Sec. 1, of the Oregon constitution.

Such a construction of the state constitution and statute is binding upon this court. It is a matter of purely state concern, which, when decided by

the state supreme court, renders further consideration by this court unnecessary.

Chicago v. Sturges, 32 Sup. Ct. 92.

Missouri Pac. R. Co. v. Kansas, ex rel. Taylor,
216 U. S. 262.

Jack v. Kansas, 199 U. S. 372, 379.

Smiley v. Kansas, 196 U. S. 447, 454-5.

Merchants' Bank v. Pennsylvania, 167 U. S.
461, 462.

Encyc. of U. S. Sup. Ct. Rep., Vol. 4, p. 1068,
note 691, citing numerous cases.

Other cases from the Oregon supreme court sustaining orders of the present Railroad Commission:

Portland Ry. L. & P. Co. v. Railroad Commission, 57 Or. 126, 105 Pac. 715.

Id. v. Id., 56 Ore. 468, (rehearing denied).

Martin v. Oregon R. & N. Co., 58 Or. 198,
113 Pac. 17.

Southern Pac. Co. v. Railroad Commission of Oregon, (December 26, 1911), — Ore. —,
119 Pac. 727.

The constitutionality of the Act was also sustained in the United States circuit court for the District of Oregon.

Oregon Railroad & N. Co. v. Campbell, 173
Fed. 957.

Southern Pacific Co. v. Campbell, 189 Fed. 182.

The latter is the case at bar. It is worthy of consideration that the first of the above-named cases was decided by Judge Wolverton, and the second by Judge Bean, both of whom were members of the supreme court of Oregon for many years.

Under a former railroad commission act of Oregon the authority of the commission was sustained.

State v. Southern Pacific Co., 23 Or. 424.

Believing the decision of the supreme court of Oregon is decisive of this question so far as respects the Act, as being in conflict with the constitution of the state of Oregon, we cite no further authorities and refrain from further argument thereon. Should the court, however, desire to examine other authorities, it is respectfully referred to the brief filed in this court on behalf of the same appellees in case No. 424, entitled *The Oregon Railroad & Navigation Company v. Thomas K. Campbell*, now pending. The authorities and discussion on this point will be found on pages 153 to 162 of the brief, both pages inclusive.

PENALTIES.

In the bill of complaint, clause (i), paragraph XII (Rec. 46) appellants summarize thus their allegations as to the penalties prescribed by the Act and their effect:

"Said Railroad Commission Act is void and of no force and effect in this: that it provides for excessive and unusual penalties, fines and punishments, and thereby deprives the complainants and other common carriers and other citizens of the United States of the equal protection of the laws and thereby takes property without due process of law."

Clause (i) of paragraph V of the Assignment of Errors is in the same language (Rec. p. 64).

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It is difficult to extract from the bill just what appellants are complaining of respecting penalties. We assume, in virtue of the latter part of their statement, they are seeking to invoke the protection of the fourteenth amendment to the constitution of the United States.

ATTORNEYS' FEES.

The only provision of the Act quoted by appellants in their bill is section 51 (Rec. p. 40) as follows:

"If any railroad shall do or cause to be done or permit to be done any matter, act or thing in this Act prohibited, or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, such railroad shall be liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of such violation together with a reasonable counsel or attorneys' fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case; provided, that any recovery as in this section provided shall in no manner affect a recovery by the state of the penalty prescribed by such violation, and that the damages provided in section 26 hereof, awarded the aggrieved party, by reason of cars not being furnished when applied for shall be in lieu of the treble damages awarded by this section."

This section has been sustained as constitutional by the supreme court of the state of Oregon.

Martin v. Oregon R. & N. Co. 58 Or. 198,
113 Pac. 17.

Provisions of statute allowing attorneys' fees sustained:

Riverside Mills v. Atl. Coast Line R. Co., 168 Fed. 990.

Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73.

The federal Act to Regulate Commerce contains a similar provision for the recovery of attorneys' fees (section 8).

See also *C. B. & I. R. Co. v. Feintuch*, 191 Fed. 482.

There are some of the usual general allegations of the danger appellants will be exposed to "of excessive fines and penalties provided for in the Act" and of actions the "Attorney General of the State of Oregon threatens to and will institute" * * * "to recover said penalties" unless restrained by the court," etc.

However, the only penalties referred to in the bill of complaint are those found in the section above quoted.

Admitting this generalization is sufficient as a pleading, it is doubtful if the sections of the act relating to penalties are properly before the court in this case or that the question can be presented in the manner attempted for two reasons:

First—No penalties are sought to be recovered.

Second—The sections providing penalties are wholly separable from the remainder of the Act.

United States ex rel. Atty. General v. Del. & Hudson Co., 213 U. S. 366, 417.

PENALTIES NOT UNDULY SEVERE.

It is uncertain from the bill whether complaint is made that the penalties prescribed are so severe that the whole act is necessarily unconstitutional, or, considered with the review provisions, it is still unconstitutional. If based on the first contention, the bill cannot stand. The severity of the penalty is primarily, a matter for legislative discretion, and in statutes of a character like the one under consideration, penalties must necessarily be of greater severity than in cases where the rewards for disobedience would not be so great. This is a matter for legislative, and not for judicial discretion.

Southern Express Co. v. Commonwealth, 92 Va. 59, affirmed, without opinion, 168 U. S. 705.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339.

The carriers have an efficient way of avoiding the severity of the penalty—by truly obeying the laws of the state. If they do this, they are in no danger of the penalties; if they do not, they are in no condition to complain of the laws.

Burlington, C. R. & N. Co. v. Dey, 82 Iowa, 312, 341 (sustaining the penalty provisions of the Iowa Railroad Commission Act, which imposed fines from \$1000 to \$5000 for the first violation, and of not less than \$5000 nor more than \$10,000 for a second offense).

In the case of *Oregon Railroad & Navigation Company v. Campbell*, 173 Fed. 957, at page 988 *et seq.*, the court discussed the penalty provisions

of the Oregon Act, as they existed prior to the amendment of section 33, concluding at page 990 as follows:

"Now it is urged that the case of *Ex parte Young*, 209 U. S. 123, is decisive of the particular point here presented. The statutes under consideration in that case, however, were most severe and drastic. For a violation of the act, if by a natural person, a fine of from \$2500 to \$5000 was imposed for the first offense, and double that for each subsequent offense, and a like fine was imposed if the carrier was a corporation. Another section of the act fixed passenger rates at two cents per mile, and provided that any railroad company, or any officer or representative thereof, violating any of the provisions of the act should be guilty of a felony, and subject to a fine not exceeding \$5000, or imprisonment in the state prison not exceeding five years, or both. Another section provided for the regulation of freight traffic, and made any violation of such regulation a misdemeanor, punishable by imprisonment in the county jail. It will be seen at once that there is no comparison between the penalties imposed by the Oregon statute and that of Minnesota, and the difference is so wide as to render the *Young* case not authoritative here.

"Nor do I think that the penalties imposed are exorbitant or burdensome for willful violations of the provisions of the act. They were designed to secure an enforcement of the law, and I discover no intendment to prevent the railroad companies concerned having ample recourse to any court having jurisdiction for relief."

Considering the purpose for which the penalties are inflicted, the fact that by the express provisions of the statute the penalties must be recovered by a separate action, that the railroad has its defense and its day in court, that a review by the courts is provided of the orders of the Commission, and the statute gives them precedence over all other civil matters, it is difficult to see how the law deprives appellants of due process of law or of any defense they may have to protect their property rights.

It should also be borne in mind that, since the passage of the original Railroad Commission Act, and prior to the commencement of the suit at bar, the Act was amended relieving the carriers from all possibility for penalties pending a hearing by the court.

Indeed it is difficult to see what possible criticism can be made of the amended Act.

It is not improbable appellants' allegations respecting the provisions of section 33, found on page 41 of record, were made under a misapprehension of the facts, for the bill of complaint as filed, prior to amendment by consent, contained the *original* and not the *amended* section. Otherwise it is difficult to see their applicability to the amended section.

PENALTIES PROVIDED IN ACT TO REGULATE COMMERCE.

The penalties provided by Congress for violations of the Act to regulate commerce are far more dras-

tic than those provided by the Act creating the Railroad Commission of Oregon. As illustrative, under the Act to regulate commerce the doing of anything prohibited or declared unlawful or of willful omission of a thing required is made a misdemeanor with a fine not to exceed \$5000 for each offense and if an unlawful discrimination, two years imprisonment may be inflicted in addition (Sec. 10, Act to Regulate Commerce). For false billing, classification or weighing, a fine of \$5000 and two years imprisonment is provided (Sec. 10, Act to Regulate Commerce). For rebating, a fine of \$1000 to \$20,000 for each offense with a possible imprisonment of two years is provided (Sec. 1, Elkins act). Failure to obey an order is punished by a fine of \$5000 for each offense and each distinct violation is a separate offense (Sec. 16, Act to Regulate Commerce). Failure to attend and testify or produce books and papers is punished by a fine of \$100 to \$5000 with an imprisonment of not more than one year or both (Immunity of Witness Act).

PENALTY PROVISIONS MUST BE CONSIDERED WITH OTHER PROVISIONS.

The penalty sections of the Act must be considered with other sections connected with the same subject matter.

Sections 32 to 35 provide procedure by which any corporation dissatisfied with any order of the Commission may commence a suit to vacate the same, and section 33 provides for the issuing of

an injunction suspending the operation of any such order upon order of court and giving bond provided by the Act. If the court issues an injunction suspending the order of the commission, penalties run during the pendency of the restraining order.

**RULE WHERE PART OF ACT IS CLAIMED
TO BE UNCONSTITUTIONAL.**

Where part of a statute is unconstitutional, the courts do not declare the remainder void also, unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so closely connected together in meaning that it cannot be presumed that the legislature would have passed the one without the other. This is the rule, though the constitutional and unconstitutional provisions be contained even in the same section, if distinct and separable. This court has construed the penalty provisions of commission and rate regulation acts as severable from the remainder of the act.

Cooley, Const. Limitations, 7th Ed, p. 246.

Reagan v. Farmers L. & T. Co., 154 U. S. 362, 395-6.

Willcox v. Consolidated Gas Co., 212 U. S. 19, 53, 54.

Fleischner v. Chadwick, 5 Ore. 152, 154.

State v. Wiley, 4 Ore. 184, 187.

C. B. & Q. R. Co. v. Jones, 149 Ill. 361, 387.

State v. Railroad Commission, 52 Wash. 17, 33.

St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317, 359.

R. R. Comm. v. Central of Ga. Ry. Co., 170 Fed. 225, 239.

EX PARTE YOUNG.

On argument below, appellants relied upon the decision in *Ex parte Young*, 209 U. S. 123, to support their allegations as to the effect of the penalty provisions of the Oregon Act. The circuit court below, in *Oregon Railroad & Navigation Co. v. Campbell*, 173 Fed. 957, has effectually distinguished the Young case from those which can arise under the Oregon Act, both under the facts and on the law.

In the *Young* case, the supreme court laid great stress upon the fact that the rates were established without any prior hearing having been had, and said (page 148):

"To impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given), only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event."

The court says:

"We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

The acts attacked were legislative maximum rate acts with drastic penalties, one fixing passenger rates, one commodity rates. An order of the Minnesota railroad and warehouse commission was also attacked. The acts in question were mandatory and conclusive and did not purport to be a general plan of regulation. No hearing was had, no opportunity to inquire into the reasonableness of the rates given, no review provided. We quote from the opinion (page 145):

"For disobedience to the freight act the officers * * * of the company are made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days."
* * * "Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding \$5000 or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment."

The sale of each ticket above the price permitted by the act would be a violation thereof. The court

also (page 146) calls attention to the fact of the officers, agents or employes of the company having to take "*the risk of imprisonment for years as a common felon.*"

It is now sought to apply the doctrine of the *Young* case to every act, state or federal, creating a regulative commission, and by construction make it cover cases and acts to which it has no application.

PROCEDURE UNDER OREGON COMMISSION ACT: ADEQUATE PROTECTION OF CARRIERS AND REMEDY.

Examination of the Oregon Act shows the legislature has provided full protection against any unlawful or unjust action of the Commission, and has made ample provision for a full hearing of the railroad.

The only possibility of a jail sentence is under section 29, which makes the refusal to testify, produce books and papers, etc., a misdemeanor, punishable by fine of from \$100 to \$1000 or by imprisonment in the county jail for not more than one year.

After complaint is filed and before proceeding with the investigation, the railroad complained against must be given ten days notice of the complaint, and then at least ten days notice of the time and place of hearing; all parties are entitled to be heard and have process to enforce the attendance of witnesses.

Other provisions for the purpose of securing a full and complete hearing to all concerned are pro-

vided. No lawful order can be made without observing all the jurisdictional requirements (Sec. 28-29).

The order is not conclusive, but is made *prima facie* lawful, subject to review as provided in section 32 and section 33 as amended.

The court's attention is called to the provisions of the various sections quoted in the statement in this brief as indicating with what care the legislature provided not only every opportunity for the railroad to be heard, but also ample and adequate remedy in the courts to review the orders of the Commission and in the meantime on cause being shown to suspend the operation of the orders. Provision is also made for expediting the trials both in the circuit and supreme courts.

RAILROAD MAY MAKE COMPLAINT WITH LIKE EFFECT AS INDIVIDUAL.

Further, if any order made by the Commission is or becomes unreasonable in operation, the law makes ample provision for the correction of the order by the Commission itself, on the application of the aggrieved railroad. Section 28 provides that

"This section shall be construed to permit any railroad to make complaint with like effect as though made by any person, firm, corporation, or association, mercantile, agricultural or manufacturing society, body politic or municipal organization."

The same section provides:

"Upon complaint of any person, firm, corporation or association, or of any mercantile, agricultural or manufacturing society or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory * * *"

—the Commission may investigate the same and make an order substituting a reasonable or non-discriminatory rate, etc.

Section 30 provides:

"The Commission may at any time, upon notice to the railroad, and after opportunity to be heard as provided in section 28, rescind, alter or amend any order fixing any rate or rates, fares, charges or classification, or any other order made by the Commission, and certified copies of the same shall be served and take effect the same as herein provided for original orders."

Rates may be unreasonable from either one of two standpoints: they may be unreasonably high, from the standpoint of the public, or unreasonably low, from the standpoint of the railroad. If a rate be too high from the standpoint of the public provision is made for the filing of complaint by the public or its representative with the Commission, and for investigation by that tribunal and the fixing of a reasonable rate.

If a rate be too low to be reasonable, the carrier may advance the same without the consent of the

Commission, except in cases where the rate has previously been fixed by the Commission, after notice and hearing, as reasonable. In that event, by section 28 the railroad is given the right to complain to the Commission that the rate fixed is in "any respect unreasonable," and by section 30, the Commission, after notice and opportunity to the railroad to present its case, may alter or amend its order. The rate reasonable yesterday may become unreasonable tomorrow, and the Oregon Act is well designed to give the railroad the same privilege of correction of orders to conform to changed conditions that it gives every other citizen. In the court below, appellants contended they were deprived of the opportunity to make complaint of the unreasonableness of a rate before the Commission, but this, we submit, is based on a misconception of the language and intent of the statute.

Indeed, it would be difficult to frame a statute which would more carefully guard the rights of the parties. No authority of which we are aware has ever held that a statute containing provisions such as are found here does not constitute "due process."

It is not alleged by appellants that they were in any particular denied any of these rights under the law, that the Commission did not follow the law, that appellants did not have every opportunity to present any and every fact they desired. On the contrary it affirmatively appears otherwise from the bill of complaint. At the hearing appellants were represented by counsel, testimony taken and

argument had. The case was investigated in the manner required by law, and the order made after due deliberation.

VENUE OF SUITS IN STATE COURTS.

The provision of the Act, section 32, which confers jurisdiction on the circuit court of the state of Oregon for Marion county is not subject to criticism. It deprives appellants of no constitutional rights. Marion county is the county of the state where the capital of the state is situated and all state offices located. The office of the Railroad Commission is by law required to be maintained in the capitol.

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362.

In the court below they contended, and we assume in this court, appellants will contend that this provision of the statute deprives "the complainants of their right to litigate their cause in any court of the state, and in the courts of the United States, and is thereby violative of the fourteenth amendment to the constitution of the United States," citing certain cases.

Before referring to the cases cited, it may be said:

1. The state has the right to fix the venue of suits against its officers in its own courts.
2. No attempt is made by any provision of the Act to limit in any wise the rights of parties to appeal to any court having jurisdiction.

In *Oregon Railroad & Navigation Company v. Campbell*, 173 Fed. 957, in passing on this question at page 990, the court says:

"I discover no intendment to prevent the railroad companies concerned having ample recourse to any court having jurisdiction for relief."

The cases cited by appellants were *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, and others of like nature.

Counsel saw their inapplicability and in the brief in the court below stated the cases cover "state statutes subjecting a foreign corporation authorized to do business within a state to restrictions which would prevent such corporation from litigating its rights in the federal courts or removing suits or actions brought against it to the federal courts."

Where, however, is the application of such cases to the Act in question? No such provision is found in the Act, and it will certainly not be presumed the legislature intended to enact an unconstitutional provision, nor will a court so construe the Act, unless compelled to by virtue of the language used or the necessary effect of its operation. The utmost that could be claimed is that if the section is construed as coming within the condemnation of the law announced in the cases cited, *the particular section, not the entire act*, would be void.

But why should it be so construed when neither the language, purpose nor its effect require it?

**SHOULD APPELLANTS HAVE EXHAUSTED
THEIR REMEDY IN THE STATE COURTS
BEFORE BRINGING THIS SUIT?**

Considering the provisions of this act, it is a matter of grave doubt under the authority of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, whether appellants should not have exhausted the remedy provided by the Act itself for the determination of the reasonableness of the rates fixed by the order before resorting to the federal courts for relief.

**DUE PROCESS OF LAW—RIGHT TO JUDI-
CIAL INVESTIGATION OF REASON-
ABLENESS OF RATES.**

As just pointed out, it would seem appellants had but to follow the provisions of the Act to have secured relief, and the remedy afforded them is plain, adequate and speedy.

It is not to be assumed that state courts are any less careful of the rights of litigants than are federal courts, nor is this assumption the basis of the jurisdiction of federal courts in cases of this character.

In the light of the facts, and of the letter and spirit of the law, it is somewhat difficult to believe appellants urge this point seriously, but it would rather seem they use it as a dragnet in the hope something may be entangled in its meshes.

In the court below no specific suggestion was made as to how or where appellants were denied due process, and it may be nothing will be urged

in this court. However, appellees must proceed upon the theory that the various assignments of errors will be presented.

Of late in many instances the case of *Chicago, M. & St. P. R. R. Co. v. Minnesota*, 134 U. S. 418, is cited in support of the allegations of the lack of due process of law in cases of this character irrespective of the law under review and the law before the court in that case. The same case is sometimes attempted to be used as authority for the proposition that courts will inquire into the reasonableness of rates from a mere traffic and not a constitutional standpoint. The following expression in the opinion is that generally quoted:

"It" (referring to the order) "deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

Necessarily this statement was based on the particular facts before the court, and applied and was intended to apply to those facts and the law as it had been construed by the supreme court of Minnesota.

Taking this extract from this decision and the declaration of the Oregon Act, section 12, that "the

charges made for any service rendered or to be rendered * * * shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful," it is contended the carrier has the right to a judicial determination of the reasonableness of the rate in the ordinary meaning of the word reasonable, considered purely as a traffic matter.

In other words, after the commission has heard and passed on the question as to the reasonableness of a particular rate as a traffic proposition, the same question is to be heard and determined again by a court.

THE MINNESOTA CASE IS NOT AUTHORITY FOR THIS CONTENTION.

In the Minnesota case, this court was bound by the construction put upon the act then in question by the Minnesota supreme court, thus set out in the opinion:

"The supreme court [of Minnesota] authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but *final and conclusive* as to what are equal and reasonable charges; that *the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact*; that, under the statute, the rates published by the

commission are the only ones that are lawful, and therefore in contemplation of law the only ones that are equal and reasonable." (Italics ours).

In the majority opinion the court said:

"No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law."

The court, it will be observed, did not undertake to say whether the particular rates in question were or were not reasonable. It simply held under the statute in question due process of law was denied.

There was some general discussion of the subject which may be misleading if superficially read, but when taken in connection with the concurring opinion of Mr. Justice Miller and viewed in the light of later cases decided by the supreme court, the meaning of the court cannot be doubted. The proposition as stated by Mr. Justice Miller is that neither the legislature nor the commission acting under this authority can establish arbitrarily, and without regard to justice and right, a tariff of rates which is so unreasonable as practically to destroy the value of property.

In the case of *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 749, the court, reviewing the Minnesota case, said:

"What this court said about the Minnesota statute can have no application to the present

case unless it be made to appear that the constitution and laws of California invest the municipal authorities of that state with power to fix water rates arbitrarily, without investigation, and without permitting the corporations or persons affected thereby to make any showing as to rates to be exacted or to be heard at any time or in any way upon the subject."

The court then quotes with approval the following language from the case of *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 306-7, 309, 315:

"But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation have come to a different conclusion as to the reasonableness of the rates fixed."

Let us see where this contention would lead to. *If the reasonableness of a rate, as a mere traffic proposition, is a judicial question, then the court may, in any case, review the finding of the Commission on this question.* If the court may determine the reasonableness of a rate in the sense indicated it may declare, and indeed would be driven to say, what is a reasonable rate to be charged in the future, and, therefore, usurp purely legislative and administrative power.

The Minnesota case is authority against this proposition, and not in its favor.

Under the facts and law now before the court, how can appellants urge they have been denied due process of law or that on the facts as alleged in the bill of complaint and exhibits made a part thereof the *Minnesota* case is authority for such contention? A forceful discussion of this same point based on the *Minnesota* case will be found in *State ex rel. Oregon R. & Navigation Company v. Railroad Commission of Washington*, 52 Wash. 17, at pages 27, 30-31.

DUE PROCESS OF LAW DOES NOT ALWAYS REQUIRE THE ACTION OF A COURT.

Due process of law merely requires such tribunals as are proper to the subject in hand. Reasonable notice and a fair opportunity to be heard before some tribunal before the issues are decided on are the essentials of due process of law.

In *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, at page 571, Mr. Chief Justice Fuller, speaking for the court says (*italics ours*):

"The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression; *that the state has power to exercise this control through boards of com-*

missioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial or infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state that, in such particulars, a law enacted in the exercise of the police power of the state is valid, will not be reversed by this court on the ground of an infraction of the constitution of the United States."

Citing

Nashville, C. & St. L. Co. v. Alabama, 128 U. S. 96.

Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174.

Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26.

Dent v. West Virginia, 129 U. S. 114.

Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386.

Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364.

The following cases also discuss and define what constitutes due process of law:

Kennard v. Louisiana ex rel. Morgan, 92 U. S. 480, 482.

Davidson v. New Orleans, 96 U. S. 97, 102.
Brown v. New Jersey, 175 U. S. 172, 176.
Public Clearing House v. Coyne, 194 U. S.
 497, 508.

The right of appeal is not an essential element
 in due process of law.

Raetz v. Michigan, 188 U. S. 505, 508.

PREScribing RATES FOR THE FUTURE A LEGISLATIVE FUNCTION.

That the fixing of reasonable rates to be charged
 in the future is for the legislature and not for the
 judiciary is too well established by the decisions
 of this court to require citation of authorities.
 Courts set aside the orders of rate commissions
 only when their powers have been exercised beyond
 their jurisdiction, or their discretion has been
 abused, or a constitutional right has been impaired
 and property confiscated under the guise of regu-
 lation.

Reagan v. Farmers' L. & T. Co., 154 U. S.
 362, 397.

San Diego L. & T. Co. v. National City, 174
 U. S. 739, 754.

Knoxville v. Knoxville Water Co., 212 U. S. 1.

Willcox v. Consolidated Gas Co., 212 U. S. 19.

*Interstate Commerce Commn. v. Cincinnati,
 etc., R. Co.*, 167 U. S. 479, 499.

McChord v. Louisville & N. R. Co., 183 U. S.
 483, 495.

Home Tel. & T. Co. v. Los Angeles, 211 U. S.
 265, 278.

Honolulu R. T. Co. v. Hawaii, 211 U. S. 282,
290-291.

Prentis v. Atlantic Coast Line, 211 U. S. 210,
226.

Several of the foregoing cases concede that the legislative power to fix rates for the future may be delegated to an administrative tribunal. This point, in the light of the decision of the Oregon supreme court upholding the delegation of power, needs no further discussion.

THE ACTION OF THE COMMISSION HAS THE EFFECT OF LAW.

Whether the legislature names the specific rates directly, or it adopts general rules and delegates power to a commission to apply them to specific facts and to exercise its discretion in respect thereto, the result is the same,—the ultimate act is legislative. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power.

Knoxville v. Knoxville Water Co., 212 U. S. 1.

Prentis v. Atlantic Coast Line, 211 U. S. 210.

Honolulu Rapid Transit & Land Co. v. Hawaii,
211 U. S. 282.

Atlantic Coast Line Ry. Co. v. North Carolina,
206 U. S. 1.

Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.,
204 U. S. 426.

Texas & Pac. Ry. Co. v. Mugg, 202 U. S. 242.

Texas & Pac. Ry. Co. v. Cisco Oil Co., 204
U. S. 449.

**"UNREASONABLE," AS USED BY COURTS IN
PASSING ON REASONABLENESS OF RATES
FIXED BY LEGISLATIVE AUTHOR-
ITY, MEANS CONFISCATORY.**

The law is well settled that the word "unreasonable" in the sense it is used in the cases means "confiscatory." That appellants appreciate this fact is shown by their weaving into the bill of complaint as a cause of suit, *pro tanto* confiscation—not *actual confiscation*—merely at the worst a reduction in revenue.

This court has uniformly held it will not interfere with orders of state commissions, municipal ordinances, or state statutes, unless it finds that the rates prescribed therein are confiscatory. Perhaps the leading case on this proposition is the case of *San Diego Land & Town Company v. National City*, 174 U. S. 739, where it was held that the constitution of the state of California, which provided that water rates should be fixed annually by a board of supervisors, or city or town council, by ordinance or otherwise, and a statute in accordance with the constitutional provision, afforded due process of law. In that case it was held that the rates so fixed were not so unreasonable as to call for judicial interference. Mr. Justice Harlan laid down *in extenso* the rules by which the power to be exerted by the court in injunction proceedings should be determined. While the constitution did not provide for a hearing, the supreme court of California had decided that the constitution and statute of the state forbade the arbitrary fixing of rates without reference to rights.

In *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, the supreme court of California had said:

"The constitution does not contemplate any such mode of fixing rates. It is not a matter of guesswork or an arbitrary fixing of rates without reference to the rights of the water company or the public. When the constitution provides for the fixing of rates or compensation, it means reasonable rates and just compensation. To fix such rates and compensation is the duty and within the jurisdiction of the board. To fix rates not reasonable or compensation not just is a plain violation of its duty. But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing."

After quoting at length from this decision of the supreme court of California, Justice Harlan said in the above cited case (174 U. S. p. 754):

"But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all

the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents clearly and beyond all doubt such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." [Citing *Chicago and Grand Trunk Railway v. Wellman*, 143 U. S. 339, 344; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362-399; *Smyth v. Ames*, 169 U. S. 466; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 614, 615.]

Further on in the opinion, at page 759, the court said:

"The only issue properly to be determined by a final decree in this cause is whether the ordinance in question, fixing rates for water supplied for use within the city, is to be stricken down as confiscatory by its necessary operation, and therefore in violation of the constitution of the United States. If the ordinance considered in itself, and as applicable to water used within the city, is not open to any such objection, that disposes of the case so far as any rights of the appellant may be affected by the action of the defendant. . . .

"Upon a careful scrutiny of the testimony our conclusion is that no case is made that will authorize a decree declaring that the rates fixed by the defendant's ordinance, looking at them in their entirety and we cannot properly look at them in any other light—are such, as amount to the taking of property without just

compensation, and therefore to a deprivation of property without due process of law. There is evidence both ways. But we do not think that we are warranted in holding that the rules upon which the defendant's board proceeded were in disregard of the principles heretofore announced by this court in the cases cited. The case is not one for judicial interference with the action of the local authorities to whom the question of rates was committed by the state."

In the *Knorrville Water Company* case, 212 U. S. 1, a suit was brought to arrest the operation of an ordinance of a municipality on the ground that the ordinance was void and of no effect. After dealing specifically with the facts in the case, this court announced certain rules to be followed in cases where rates for public service corporations, fixed by tribunals in accordance with law, were attacked in the federal courts. We quote (page 16):

"The jurisdiction which is invoked here ought, as has been said, to be exercised only in the clearest cases. If a company of this kind chooses to decline to observe an ordinance of this nature and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the constitution of the United States. . . . In *San Diego Land and Town Company v. National City*, 174 U. S. 739, 754, this court said 'judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant

attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use.'

"And in *San Diego Land and Town Company v. Jasper*, 189 U. S. 439, after repeating with approval this language, it was said (p. 441): 'In a case like this we do not feel bound to examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was possible for a fair-minded board to come to the result which was reached.'

"It cannot be doubted that in a clear case of confiscation it is the right and duty of the court to annul the law. Thus, in *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, where the property was worth more than its capitalization, and upon the admitted facts the rates prescribed would not pay one-half of the interest on the bonded debt; in *Covington, etc., Turnpike Co. v. Sandford*, 164 U. S. 578, where the rates prescribed would not even pay operating expenses; in *Smyth v. Ames*, 169 U. S. 466, where the rates prescribed left substantially nothing over operating expenses and cost of service; and in *Ex parte Young*, 209 U. S. 123, where on the aspect of the case which was before the court it was not disputed that the rates prescribed were in fact confiscatory, injunctions were severally sustained. But the case before us is not a case of this kind. Upon any aspect of the evidence the company is certain to obtain a substantial net revenue under the operation of the ordinance. The net income

in any event would be substantially six per cent, or four per cent after an allowance of two per cent for depreciation. (See *Stanislaus County v. San Joaquin Co.*, 192 U. S. 201.) We cannot know clearly that the revenue would not much exceed that return. We do not feel called upon to determine whether demonstrated reduction of income to that point would or would not amount to confiscation. Where the case rests as it does here, not upon observation of the actual operation under the ordinance, but upon speculation as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack something of the return which would save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt. The valuation of the property was an estimate, and is greatly disputed. The expense account was not agreed upon. The ordinance had not actually been put into operation; the inferences were based upon the operations of the preceding year; and the conclusion of the court below rested upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties. The city authorities acted in good faith, and they tried, without success, to obtain from the company a statement of its property, capitalization, and earnings.

"The courts in clear cases ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind."

In the *Consolidated Gas Company* case, 212 U. S. 19, the court reiterated the principle set forth in the *Knoxville Water* case, saying at page 41:

"The case must be a clear one before the courts ought to be asked to interfere with the state legislation upon the subject of rates, especially before there has been any actual experience of the practical result of such rates. * * * The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as, under the circumstances, is just both to the owner and the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public."

In his work on *American Railroad Rates*, Judge Noyes discusses this question at length:

At page 250, the author says (*italics ours*):

"It seems impossible to draw a constitutional statute conferring upon a court power to review upon the facts the action of the Interstate Commerce Commission in making a rate. The courts could not make a rate, for rate making is not, and cannot be, a judicial function. They cannot supervise the action of the commission for precisely the same reason. There is no difference in principle between making a rate and reviewing upon its merits the action of a commission in making a rate. In both cases the exercise of legislative, not judicial, discretion is required. A statute requiring the courts to participate directly or indirectly in making rates for the future would impose non-judicial functions and would be

unconstitutional. To repeat what we have already pointed out, it cannot be too clearly borne in mind that while the courts can determine the reasonableness of the carriers' charges they cannot, in the same way and from the same point of view, determine the reasonableness of commission-made rates.

"When a rate is made by a commission under a law it has the effect of a law *which the courts can only review upon constitutional grounds. The distinction is between the reasonableness of a charge and the reasonableness of a law.* But it may be said that the courts always have examined rates made by commissions to determine whether they are reasonable, and decisions of the Supreme Court of the United States may be pointed out where the enforcement of commission-made tariffs has been enjoined because the rates were unreasonable. But, as we have already seen, the word '*unreasonable*' in the sense of these decisions means *confiscatory*. The only ground upon which the courts could interfere with rates made by the Interstate Commerce Commission would be that they violated the fifth amendment of the Constitution—that they deprived the railroad of its property without just compensation or due process of law. And they could only have that effect when they were confiscatory."

It is also discussed on page 212, foot note.
Again at page 207:

"When a commission, in the exercise of power delegated by the legislature, makes a rate, the result is the same as if the legislature directly acted. The act of the commission supplements and makes effective the act of the

legislature. The rate resulting from the joint action of the legislature and its agent is the law. Making a rate in legal effect is making a law that such shall be the rate. The courts have only one inquiry with respect to such a rate. Is it constitutional?"

On page 226 the author sets forth his conclusions with especial regard to federal action, as follows:

"1. Rates made by Congress directly or through a commission have the force of law. Making a rate in effect is making a law that such shall be the rate.

"2. The courts can alone determine whether law-made rates conflict with the fifth amendment.

"3. The law-made rates only conflict with the fifth amendment when they deprive the railroad of its property without just compensation or due process of law; i. e., when they are confiscatory.

"4. Schedules of rates may be confiscatory. Theoretically, individual rates may be confiscatory; practically, they cannot be.

"5. A rate may be unreasonable, and therefore an unlawful charge when made by a railroad. The same charge as a law-made rate may not be so unreasonable as to be confiscatory.

"6. Courts can only pass upon the constitutionality of law-made rates. They cannot exercise supervisory power over such rates and thereby participate in the exercise of the legislative power of making rates."

In passing on this question the court below said in the case at bar:

"This court has no authority to fix rates nor should it attempt to usurp the powers of the

Commission upon its conception as to whether such powers have been wisely exercised or not. It can review the findings of the Commission only so far as to determine whether or not the rates promulgated by it will deprive the carrier of its property without just compensation. [citing authorities] nor do I think its power in this regard is any respect enlarged by the provisions of the state law for a review by the state courts of the acts of the Commission." (Rec. 56).

EXTENT OF POWER OF JUDICIARY TO CONTROL LEGISLATURE.

It is elementary that the powers of legislation possessed by legislative bodies are absolute, save as limited by the grants in the federal or restrictions in the state constitution; and that the action of the legislature is valid unless its conflict with federal or state constitution is pointed out. The sole control of the judiciary is to declare an act of the legislature unconstitutional,—the motives of the law-making body, the wisdom or justice of its enactments do not concern the judiciary. The same rule applies to the action of the legislature's agent. As said of the action of the Interstate Commerce Commission, "power to make the order, and not the mere expediency or wisdom of having made it, is the question."

Cooley, Const. Lim., (7th Ed.) 236, 241, 257.
St. Louis & I. M. R. Co. v. Taylor, 210 U. S.
281, 295.

Interstate Com. Commn. v. Illinois Central R. Co., 215 U. S. 452, 470.

PRESUMPTION ORDER IS LAWFUL.

A rate made under legislative authority is the law, and the same presumptions of constitutionality attach to it as to a statute. Every statute, including a statute fixing rates, is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt the expressed will of the legislature should be sustained, especially in the absence of any test of the statute in actual operation.

Munn v. Illinois, 94 U. S. 113.

Ruggles v. Illinois, 108 U. S. 536, 541.

Sweet v. Rechel, 159 U. S. 380, 392.

Chicago, etc., R. Co. v. Wellman, 143 U. S. 339, 344.

San Diego, etc., Co. v. National City, 174 U. S. 739, 754.

Chicago, etc., R. Co. v. Tompkins, 176 U. S. 167, 173.

Louisville, etc., R. Co. v. Kentucky, 183 U. S. 503, 511.

Knoxville v. Knoxville Water Co., 212 U. S. 1, 8.

Willcox v. Consolidated Gas Co., 212 U. S. 19, 41.

NO RIGHT TO JUDICIAL HEARING BEFORE
RATES BECOME EFFECTIVE.

In view of the foregoing authorities, it probably will not be seriously urged that public service corporations have a legal right to a judicial hearing before rates fixed by law become effective. Indeed,

it cannot be doubted that this court in the *Consolidated Gas, Knoxville Water Company*, and other cases really adopted a rule of action to be followed in cases of this character to avoid the congestion of its dockets with appeals which hinged upon the illegal confiscatory nature of rate statutes.

It is fairly deducible from the opinion in the *Consolidated Gas* case, that unless a statute or order is clearly confiscatory, it must be submitted to a sufficient length of time, that its actual effect can be known, not merely guessed at, before the court will act. In other words courts will not nullify statutes on general allegations of confiscation or *pro tanto* confiscation.

NO RATE CAN BE SAID, AS A MATTER OF
LAW, TO BE REASONABLE IN AND
OF ITSELF.

The question is one of fact depending on many considerations. There is no legal standard by which the reasonableness of a rate can be tested.

Ill. Cent. R. Co. v. Int. Com. Comm., 206 U. S. 441.

Tex. & Pac. R. Co. v. Int. Com. Comm., 162 U. S. 197.

C. N. O. & T. P. R. Co. v. Int. Com. Comm., 162 U. S. 184.

THE COMMISSION IS AN EXPERT BODY.

The commission is an expert tribunal. It has provided for it by law means and sources of information for the purpose of being informed on the

difficult and delicate economic problems forming the basis of complaints brought before it. The performance of the duties imposed upon the commission by law makes its members experts. It is practically the only method by which the legislative body can act effectively. The courts interfere as little as may be with the determination and worth of such commissions.

Smyth v. Ames, 169 U. S. 466, 527.

Southern Pacific Co. v. Railroad Commission of Oregon (Dec. 26, 1911), — Or. —, 119 Pac. 927.

East Tenn. V. & R. Co. v. I. C. C., 99 Fed. 52, 64.

Steenerson v. Great Northern R. Co., 69 Minn. 353, 377.

Noyes, Amer. R. R. Rates, p. 206.

Redfield, Railways, (6th Ed.) Vol. 2, p. 606.

R. R. Comm. v. Ga. Ry. Co., 170 Fed. 225.

Minneapolis, etc., R. Co. v. R. R. Comm., 136 Wis. 146.

COMPARISON OF POWERS GRANTED UNDER STATE AND FEDERAL ACTS RESPECT- ING AUTHORITY TO FIX RATES.

As the authority of the Interstate Commerce Commission under the act to regulate commerce and the effect given its orders when made within the scope of its jurisdiction and powers have been substantially settled by this court, a very brief comparison of

the powers granted under the Oregon act and the act to regulate commerce is submitted.

Section 12 of the Oregon act provides:

"The charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section 1 of the act to regulate commerce, as amended, provides:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Under section 28 of the Oregon act the Commission is empowered on complaint or on its motion to investigate rates, fares, charges and classifications.

"If upon such investigation the rate or rates, fares, charges or classifications or any joint rate or rates or any regulation, practice or service complained of shall be found to be *unreasonable or unjustly discriminatory*, * * * the Commission shall have power to fix and order substituted therefor such rate or rates, fares, charges or classifications as it shall have determined to be just and reasonable and which shall be charged, imposed and followed in the future," etc.

Section 13 of the act to regulate commerce as amended provides for complaints, hearings and investigations. Section 14 provides for report and findings thereon. Section 16 provides that after full hearing under section 13 of the act if

"The commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged or collected by any common carrier or carriers * * * for the transportation of persons or property * * * are *unjust or unreasonable or unjustly discriminatory*, or unduly preferential or prejudicial * * * the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged," etc.

Further comparison will show that in substance and often in language the Oregon act and the federal act to regulate commerce are alike.

Both Congress and the legislature have thus fixed the same standard beyond which a rate shall not go and be lawful. The power of the commission in both instances is limited by providing the measure or standard it shall use. Within this limit an order of either commission is in effect a law.

Both acts condemn without qualification unjust discrimination of all kinds. As differing from the mere unreasonableness of a rate in some instances, penalties are provided for such discriminations. If an unjust discrimination exists it is condemned.

CONSTRUCTION BY THIS COURT OF THE
ACT TO REGULATE COMMERCE AND
THE POWERS OF THE COMMISSION.

The only inquiry open to the courts is whether the order was regularly made and duly served and whether any constitutional rights have been violated. In other words, are the rates fixed confiscatory? Has the Commission under the guise of regulation acted so arbitrarily as to abuse its discretion or otherwise acted beyond the scope of its authority? The power and not the mere expediency of its exercise is the question. Upon the reasonableness and justice of a rate it may be said the determinations of fact by the Commission are conclusive.

Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452.

Baltimore & O. R. R. v. United States, 215 U. S. 481.

Southern Pacific Co. v. I. C. C., 219 U. S. 433.

Delaware L. & W. R. R. Co. v. I. C. C., 220 U. S. 235.

Interstate Com. Comm v. Chicago, R. I. & P. R. Co., 218 U. S. 88, 110.

In *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 433, at page 442, the court said:

"In the argument at bar the railroad companies do not question that if complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate that body has the authority to examine the subject,

and if it finds the rate complained of is in and of itself unreasonable, having regard to the service rendered, to order the desisting from charging such rate, and to fix in a new and reasonable rate, to be operative for a period of two years. *The companies further do not deny that where the Commission exercises such authority, its finding is not subject to be reviewed by the court. Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452.* In other words, the argument fully concedes that an order of the Commission is not open to attack so long as that body has kept within the powers conferred by statute." (Italics ours).

It is worthy of note that appellant Southern Pacific Company in the case quoted from, is the appellant operating the lines of railroad involved in this cause. The appellee in the one case was the Interstate Commerce Commission and in the other is the Oregon Commission. Just why the principle is applicable in the one case and not in the other is difficult to apprehend.

In *Interstate Commerce Commission v. Delaware L. & W. R. Co.*, 220 U. S. 235, at page 251, in speaking of a finding of discrimination by the commission, the court said:

"We say the contentions all reduce themselves to this, because in the final analysis all the other differences in so far as they do not rest upon the legal propositions just stated, are based upon conclusions of fact as to which the judgment of the commission is not susceptible of review by the courts." [Citing *Baltimore &*

O. R. Co. v. United States ex rel Pitcairn, 215 U. S. 481].

And again at page 255:

"Moreover, the contention is not open for review, because the legal question of the right of the carrier to consider ownership under the section having been disposed of, the finding of the commission that to permit the enforcement of the rule would give rise to preferences and engender discriminations prohibited by the act to regulate commerce embodies a conclusion of fact beyond our competency to examine."

Unless there is some reason for treating a finding of fact as to a discrimination made by a state commission on a different basis than a like finding when made by the Interstate Commerce Commission, this authority is conclusive on this point.

In *President, Managers, etc., of Monogahela Bridge Co. v. United States*, 216 U. S. 177, the bridge company had been convicted for failing to make alterations in a bridge over an interstate waterway, which the Secretary of War required. The secretary was authorized, by general act of Congress, to prescribe reasonable regulations for the conduct of navigation on the navigable streams of the United States, after due notice and hearing. The parallel between that delegation of power and the delegation of power to make reasonable rules for the conduct of transportation upon rails is obvious.

The court held that under the delegation of authority made by Congress, the power of the secre-

tary was not an arbitrary one, as he had to give due notice and opportunity to be heard and a reasonable time to comply with the orders made; that the requirements made did not amount to a taking of property for public use without due compensation; and that there had been a hearing before the secretary. The court said (page 195):

"It does not appear that the secretary disregarded the facts or that he acted in an arbitrary manner, or that he pursued any method not contemplated by Congress. It was not for the jury to weigh the evidence and determine, according to *their* judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the courts or by juries, except that when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the courts can see to it that executive officers conform their action to the mode prescribed by Congress."

This court has repeatedly explained that the actions of the Interstate Commerce Commission can be impeached only for errors of law, and that the court does not interfere with a determination of the commission upon questions of fact, or of mixed fact and law. The determination of a reasonable rate is peculiarly a question of fact.

Illinois Central R. Co. v. Interstate Commerce Comm., 206 U. S. 441, 454.

Cincinnati, H. & D. R. Co. v. I. C. C., 206 U. S. 142, 154.

Cincinnati, N. O. & T. P. R. Co. v. I. C. C., 162 U. S. 184.

Louisville & N. R. Co. v. Behlmer, 175 U. S. 648.

What principle requires a different construction in the case of the Oregon act than in the case of the federal act to regulate commerce when the grants of power and the manner of their exercise are precisely the same? What but confusion can result from the adoption of different rules of construction?

THE STATE COURTS CONSTRUE THE POW-
ERS OF STATE COMMISSIONS AND OF
THE COURTS SUBSTANTIALLY AS
HAS THIS COURT.

In *Steenerson v. Great Northern Ry. Co.*, 69 Minn. 353, 375, 376, the court in discussing this question said:

"If * * * the legislature intended to provide that the court should put itself in the place of the commission, try the matter *de novo*, and

determine what are reasonable rates, without regard to the findings of the commission, such intent cannot be carried out, as a statute which so provided would be unconstitutional. The fixing of rates is a legislative or administrative act, not a judicial one (*State v. C. M. & St. P. Ry Co.*, 38 Minn. 281, 298). And the performance of such duties cannot, under our constitution, be imposed on the judiciary. (*Foreman v. Board*, 64 Minn. 371; *State v. Young*, 29 Minn. 474; *Reagan v. Farmers, etc., Co.*, 154 U. S. 362). * * *

"The district court can review the findings of the commission only so far as to determine whether or not the rates fixed are so unreasonable as to be confiscatory, just as an appellate court reviews the verdict of a jury for the purpose of determining whether it is so excessive that it cannot stand. * * *

"Of course, in determining whether the rates fixed are confiscatory, the court must incidentally consider what are reasonable rates, but it must also resolve every reasonable doubt on that question in favor of the findings of the commission."

See also:

Southern Pacific Co. v. Railroad Comm. of Oregon, (Dec. 26, 1911) — Or. —, 119 Pac. 727.

Minneapolis St. P. & S. Ste. M. R. Co. v. R. R. Comm., 136 Wis. 146.

Chicago, Rock Island & P. R. Co. v. Railway Commission, 85 Neb. 818, 824-5.

Spring Valley Water Works v. San Francisco, 82 Cal. 286, 306.

Jacobson v. Wisconsin Ry Co., 71 Minn. 519,
529, affirmed in 179 U. S. 287.

Morgan's etc., R. Co. v. R. R. Comm. of Louisiana, 109 La. 247, 265.

In re Amsterdam, 33 N. Y. Supp. 1009.

People v. Board of R. R. Comm., 53 App. Div.
(N. Y.) 61.

Pensacola, etc., R. Co. v. State, 25 Fla. 310.

Storrs v. Pensacola Ry. Co., 29 Fla. 617.

*State ex rel R. R. Comm. v. Seaboard Air Line
R. Co.*, 48 Fla. 129.

Doubtless cases may be found where apparently the decision involved a consideration of the "reasonableness" of the rate fixed pursuant to legislative authority. But, as is indicated by the foregoing cases, the word must be taken as meaning "constitutional and such as reasonable men might have found," or else the decisions must fall. This is clearly pointed out by Judge Noyes' work on "American Railroad Rates," p. 212, note.

EXTENT OF POWER TO REVIEW.

It is a little difficult to follow counsel's argument as to the effect the review proceedings of the Oregon statute have upon the conclusiveness of the orders of the Commission.

Substantially all commission statutes, including the act to regulate commerce, provide for court review of orders made by a commission. No one would contend that a court should not interfere to prevent impairment of a constitutional right. No court can fix rates. If the order is void for any

cause and the court has jurisdiction, it will so declare. No further authorities are required to show that the words "reasonable" and "unreasonable" in the statute in connection with court authority are used and are to be construed in the constitutional sense, i. e., unreasonable in that they are confiscatory. Because a court might conclude 25 cents was a reasonable charge and a commission had fixed it at 23 cents, it would not set aside the order unless the lower rate was in reality confiscatory.

While this right of review is entirely proper and furnishes an additional safeguard for the protection of constitutional rights, it was never intended to be transformed into an instrument to endow courts with powers they cannot exercise and to defeat the purposes of remedial and necessary laws.

COURTS DO NOT PERFORM ADMINISTRATIVE FUNCTIONS—THEY PROTECT CONSTITUTIONAL RIGHTS.

Any construction which would permit the courts to review the facts *de novo*, except within the limitations outlined, would overwhelm the judiciary with administrative work, which it is not its business to perform. The courts would be at the beck and call, not alone of every carrier which desired the reasonableness of a rate reviewed, but also of every one who was dissatisfied with the determination of any other administrative functionary, and these administrative bodies would be an unnecessary expense. Courts are the proper final arbiters

as to the protection of constitutional rights and as to the final interpretation of statutes, but the legislative, the executive, and the administrative departments, within the limits of their constitutional powers, may be safely trusted to exercise a reasoning discretion and to perform their functions intelligently, fairly, and with a view to the common good.

"The notion that commissions of this kind should be closely restricted by the courts and that justice in our day can be had only in courts is not conducive to the best results. Justice dwells with us as with the fathers, it is not exclusively the attribute of any office or class, it responds more readily to confidence than to criticism, and there is no reason why the members of the great railroad commission of this state should not develop and establish a system of rules and precedents as wise and beneficent within their sphere of action as those established by the early common law judges. We find the statute well framed to bring this about."

Minneapolis, St. P., etc., R. Co. v. R. R. Com. of Wisconsin, 136 Wis. 146, 169.

**THE COMMISSION ACT AND THE ORDER DO
NOT IMPAIR THE CONTRACT RIGHT OF
APPELLANTS TO PRESCRIBE THEIR
OWN RATES IN OREGON.**

The basis of this claim may be best stated in the language of counsel in the court below:

Section 2, article XI, of the Constitution of Oregon was, at the time of the incorporation of ap-

pellant, Oregon & California Railroad Company, as follows:

"Corporations may be formed under general laws, but shall not be created by special laws except for municipal purposes.

"All laws passed pursuant to this section may be altered, amended or repealed, but not so as to alter or destroy any vested corporate rights."

Section 34 of the act of the Legislative Assembly, approved October 14, 1862 (the general incorporation act), is as follows:

"Every corporation formed under this act for the construction of a railroad, as to such road shall be deemed common carriers, and shall have power to collect and receive such tolls or freight for transportation of persons or property thereon as it may prescribe."

IT IS CONCEDED THE OREGON SUPREME COURT HAS HELD ADVERSELY TO APPELLANTS' CONTENTION.

Counsel for appellants, in argument in the court below, said:

"It is claimed that under these constitutional and statutory provisions the articles of incorporation constitute a contract which the state cannot impair by the creation of a railroad commission, giving such commission authority to prescribe or fix rates, and inasmuch as the articles of incorporation of the Oregon & California Railroad Company were executed on March 16, 1870, and those of its predeces-

sors in interest, prior thereto, and while these statutory and constitutional provisions were in effect, that the Railroad Commission act and the order of the Commission thereunder are and each of them void."

It is but fair to say counsel conceded that the Supreme Court of Oregon in passing on this very question held otherwise.

We again quote from the brief of appellants in the court below:

"It must, however, be conceded by us that the Supreme Court of this state, following *Wells Fargo & Co. v. Oregon Railroad & Navigation Company*, 8 Sawyer 600; s. c. 15 Fed. 561, and *Ex parte Koehler*, 11 Sawyer 37; s. c. 23 Fed. 529, has held that this provision of section 34 of the act of October 14, 1862, read in connection with the articles of incorporation of the Oregon & California Railroad Company, did not constitute a contract between the state and that company, the obligation of which could not be impaired by subsequent legislation. See *State v. S. P. Co.*, 23 Or. 424, 432."

It would seem the decision of the Oregon Supreme Court, construing the reservation of power over corporations formed under authority of its Constitution, would be decisive, especially as the Oregon Constitution also contains a prohibition of the impairment of contracts. In a recent case in that court, later than the one referred to by counsel, the railroad company involved was endeavoring to justify a discrimination shown to ex-

ist by setting up a pre-existing contract calling for the lower rate upon the favored branch line. The state Supreme Court stated that the order of the Commission was claimed to violate Oregon Constitution, Art. XI, Sec. 2, *supra*, and also Art. I, Sec. 21, thereof, "No * * * law, impairing the obligations of contracts, shall ever be passed." The court said:

"In *Ex parte Koehler*, 23 Fed. 529, in construing the foregoing clause, interdicting the deterioration or extinction of any established privilege of a corporation, it was held that the railway company formed under the general corporation act of Oregon had a vested right to collect and receive a reasonable compensation for the transportation of persons and property over its road, which the legislature could not impair or destroy. The reasonable standard thus guaranteed to a common carrier is a standard which necessarily fluctuates, so that a rate which would, when adopted, have been deemed justifiable, may not thereafter be so regarded, owing to the increased traffic and the improved facilities whereby the cost of transportation is lessened. The authority of a railroad company to collect reasonable fares and charges, though a vested right, is, like all other interests, subject to the police power of the state, which may be exercised to promote the public welfare, and to establish between the common carrier and the passenger or the shipper, rules calculated to prevent the conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as reasonably consistent with a like enjoyment

of rights by others. Cooley, Const. Lim., (6th Ed.) 704.

"A grant by the Legislative Assembly to a corporation of authority to employ the right of eminent domain necessarily implies a reservation of the police power to regulate and prescribe the measure of the compensation which is determined to be reasonable, and which may be collected for transportation of passengers and freight; and if a common carrier could, by a contract stipulating the continuance of a specified rate of fares and freight for a given time, prevent any interference with such agreement, by invoking the clauses of the organic act relied upon herein, it would thereby become superior to the legislature, which doctrine will never be acknowledged by the courts. The police power, being necessary to the preservation of the rights of the citizen and to the maintenance of the autonomy and the authority of the state, cannot be bargained away in any manner whatever. Cooley, Const. Lim., (6th Ed.) 340."

Portland Ry. L. & P. Co. v. Railroad Comm. of Oregon, 56 Or. 468, 478-9.

That the Oregon court has properly interpreted the express reservation of power contained in the Constitution, and the implied power of the state to preserve its own sovereignty and autonomy, will be apparent from the authorities. They are too numerous even to cite here; if the court desires to pursue this further, the subject is well reviewed in an article by Lyne S. Metcalfe, Jr., 32 Central Law Journal, 181, which cites the authorities up to the time the article was written.

This court in *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, also announced the same doctrine.

See also

Missouri P. R. Co. v. Kansas, 216 U. S. 262.

THE EXEMPTION FROM CONTROL, IF ANY,
WAIVED BY SOUTHERN PACIFIC COM-
PANY BY ACCEPTANCE OF STATUTE
AUTHORIZING ITS LEASE.

Moreover, it appears by the complaint that the Oregon & California Railroad Company leased its property to the Southern Pacific Company—a foreign corporation; that said lease was made on the first day of July, 1887. Prior to 1887, the state law did not authorize one railroad to lease the property of another. The Oregon Legislative Assembly passed an act, filed February 17, 1887, authorizing leases to be made under certain conditions. The second paragraph of section 1 of this act reads as follows:

"2. That the state of Oregon reserves to itself through its Legislative Assembly, and in such manner as it shall determine, the right, power, and authority to prescribe the rate to be charged for the transportation of persons and property on such leased lines, and also to prescribe and make such police regulations for the government of such roads as it may from time to time determine." Laws of Oregon 1887, page 13, L. O. L., Sec. 6735.

The history of the passage of this law and the reasons for its enactment are unnecessary to discuss, but it will be noted it was after this act became effective that appellant Southern Pacific Company leased the properties of appellant Oregon & California Railroad Company, and is now engaged in the sole operation thereof.

**PRIVILEGE OF EXEMPTION IS PERSONAL
WITH THE GRANTEE, AND CANNOT BE
ASSIGNED BY LEASE, OR OTHER-
WISE TO ANOTHER.**

The privilege of exemption alleged arose out of the incorporation of Oregon & California Railroad Company, an Oregon corporation. As shown by the bill, the Southern Pacific Company is a Kentucky corporation. It has for many years operated all the lines of the Oregon & California Company under a lease. The exemption privilege, if any, was personal to the Oregon & California Company, the original grantee, and could not be assigned by it and did not pass to the present operating company by the lease of the roadbed and equipment.

St. Louis & S. F. Ry. Co. v. Gill, 156 U. S. 649.
Covington & L. T. Co. v. Sandford, 164 U. S.
578.

**ACT OF CONGRESS GRANTING LANDS IN
AID OF APPELLANT OREGON & CALI-
FORNIA RAILROAD COMPANY SUB-
JECTS IT TO STATE REGULATION.**

The court will take judicial notice of acts of Congress and we call particular attention to section 9 of the act of Congress, July 25, 1866 (c. 242, 14 Stat. 239) granting lands in aid of the construction of this railroad, the terms and provisions of which were accepted by appellant Oregon & California Railroad Company.

In view of the claim now being urged by appellants as to the limitation of the power of the state over the acts, rates and practices of such appellant the pertinency of the section referred to is apparent.

"Sec. 9. That the companies concerned shall be governed by the general laws of the respective states as to the construction and management of said railroad and telegraph line in all matters not provided for in the act."

**DOES THE RAILROAD COMMISSION ACT
AFFECT INTERSTATE COMMERCE?**

Paragraph designated (g) of the assignment of error numbered V (Rec., p. 63) is to the effect that the Railroad Commission Act is void because it violates the commerce clause of the Constitution of the United States, in that the act attempts to confer upon the Railroad Commission jurisdiction over interstate commerce and does not limit its power and authority to commerce wholly within the state of Oregon, and that the act necessarily attempts to

and does confer upon the Commission authority and power to take into consideration, in determining and fixing any rate for the carriage of freight or passengers over lines of appellants within the state of Oregon, the earnings of appellants derived from interstate traffic.

The answer to this contention is that the act neither confers nor attempts to confer the authority stated. On the contrary its provisions expressly negative even such a presumption.

This question was presented in the case of *Oregon R. & Navigation Co. v. Campbell*, 173 Fed. 957. In discussing it, at page 978 the Circuit Court said:

"The next objection urged to the act is that it is an encroachment upon the constitutional authority of Congress, in that, in practical operation, it interferes with interstate commerce. It is one thing to determine whether the act itself attempts to regulate interstate commerce, and another to determine whether in its practical operation it is effective to that end. I assume that, if an affirmative answer is given to either of these questions, the law cannot stand. Congress is accorded, under the federal Constitution, power 'to regulate commerce with foreign nations and among the several states and with the Indian tribes.' Section 8, art. 1. By the ninth article of amendment to the Constitution it is declared that:

" 'The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.'
 "And by the tenth article:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.’

“Thus is indicated, as strongly as could be, that the Constitution of the United States is but a delegation of powers, which powers, together with the implied powers that attend those that are express, necessary to a practical and efficient exercise thereof, constitute all that the general government has, or can presume to exercise. All other powers are reserved to the states, and to the people thereof—primarily to the people, as they are the repository of all power, political and civil. The whole lawmaking power out of this repository of power is committed to the several state legislatures, except such as has been delegated to the federal government or is withheld by express or implied reservation in the state constitutions. Says Denio, Chief Justice, in *People v. Draper*, 15 N. Y. 532, 543:

“Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who questioned its validity to show that it is forbidden. I do not mean that the power must be expressly inhibited; for there are but few positive restraints upon the legislative power contained in the instrument. The first article lays down the ancient limitations which have always been considered essential in a constitutional government, whether monarchical or popular;

and there are scattered through the instrument a few other provisions in restraint of legislative authority. But the affirmative prescriptions and the general arrangements of the Constitution are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the lawmaking authority as strong as though a negative was expressed in each instance; but independently of these restraints, express or implied, every subject within the scope of civil government is liable to be dealt with by the legislature.'

"So says Redfield, Chief Justice, in *Thorpe v. Rutland & Burlington Railroad Co.*, 27 Vt. 140, 142, 62 Am. Dec. 625:

" 'It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited man-

ner to the several state legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular state in question.'

"So it is that the national Constitution is wholly a delegation of power, and the state constitution a restriction or limitation of power; and the state legislatures may exercise all the reserved powers, save those which the people have withheld. It follows, very naturally and logically, from these premises, that the national government is without power and authority to legislate or to supervise or control in any manner the movement of commerce which is entirely within a state, or that which is appropriately termed intrastate, as distinguished from interstate, commerce. This arises simply from the want of power, the lack of delegation of power, to legislate touching that class of commerce. Upon the other hand, the sole power for the regulation of intrastate commerce rests with the state legislatures. Congress has expressly recognized this distinction of powers in the passage of the act to regulate commerce of February 4, 1887. 1 Supp. Rev. St., p. 529. The act declares that the provisions thereof 'shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state.' So it has been pertinently observed by Mr. Justice Harlan, in *Interstate Commerce Commission v. Brimson*, * * * [154 U. S. 447] to the same effect.

"The express purpose of the railroad commission act is to regulate transportation and

commerce, and common carriers thereof, within the state. This is apparent, both from the title of the act and from the provisions thereof. The title runs:

“To regulate transportation and commerce, and common carriers thereof in this state, and, for that purpose, to create a Railroad Commission of Oregon,” etc.

“By the eleventh section the term ‘railroad’ is defined to embrace all corporations that now, or may hereafter, operate, manage, or control ‘any railroad or interurban railroad * * * as a common carrier in this state.’ And it is further declared that:

“The provisions of this act shall apply to the transportation of passengers and property * * * and to all charges connected therewith, and shall apply to all railroad companies,’ etc., ‘that shall do business as common carriers upon or over any line of railroad within this state.’

“By section 13 it is required that every railroad shall file with the Commission schedules showing all rates, fares, and charges for the transportation of passengers and property, ‘which it has established and which are in force at the time between all points in this state upon its line’; by section 18, that ‘whenever passengers or property are transported over two or more connecting lines of railroad between points in this state,’ the joint rates of charge therefor shall be reasonable and just. These general provisions indicate an undoubted purpose to limit the scope of the exercise of the Commission’s powers within the state. But

by section 47 it is made the duty of the Commission to investigate freight rates on interstate traffic on railroads in the state, and when, in the opinion of such Commission, the rates are excessive or discriminatory, to present the facts thereof to the offending railroad company, and, if without avail, then to apply to the Interstate Commerce Commission for relief. From this one provision of the act, if from none other, the deduction is absolute that there was no intention on the part of the legislature of the state to enter the domain of interstate regulation of railroad traffic. The Commission is a state commission, designed to render state service, and no intendment should be deduced that it is empowered to execute a broader or an unlawful service, unless the language is explicit, unmistakably leading to such conclusion. No such language is found in the act, and upon its face it is not inimical to the commerce clause of the national Constitution."

ALLEGED INTERFERENCE BY THE ORDER WITH INTERSTATE COMMERCE.

Paragraph (h) of assignment of error V (Rec. 63), is to the effect that the order is violative of the commerce clause of the federal Constitution, and in conflict with the act to regulate commerce in this, that it "directly, materially and substantially affects the rates upon practically all the interstate shipments of appellants."

The alleged interference of the order with interstate commerce is beyond question the real gravamen of the complaint. Eliminate this and it is unlikely any suit would have been brought.

From an examination of the authorities on other questions presented, such as the constitutionality of the railroad commission acts, the allegations of *pro tanto* confiscation, etc., the conclusion is irresistible that this case is but one of a like nature with several now pending before this court attacking the powers of the states to fix and determine reasonable intrastate rates on the grounds of alleged interference with interstate commerce.

MANNER IN WHICH THE INTERFERENCE CLAIMED ARISES.

The basis for the contention of appellants lies in the fact that under their rate making rules, in some instances and to some points in Oregon, the rates from eastern points and California points cannot exceed the sum of the rate to the city of Portland plus the local rate to point of destination within the state, and from California points to points in Oregon the rate is generally arrived at by adding to the rate by steamer or rail to Portland the local rate out of Portland to point of destination within the state. Hence it is urged the state has no authority over the intrastate rates because when changed, the change affects an interstate rate. It should be noted that the combination of rates is not applied in all cases.

The bill affirmatively shows that the so-called "local" rates are rates which appellant Southern Pacific Company has voluntarily chosen to file with the Interstate Commerce Commission for use in computing interstate rates, and that the state rates

are not used as a factor in naming through interstate rates, except as the carrier chooses to adopt and file them for interstate purposes. Both of these facts in themselves make it impossible that the order can of itself have any application to interstate commerce. The simple expedient of naming specific through rates instead of publishing a mere formula would render this entire controversy unnecessary and make it impossible for the naming of a state rate to affect its interstate revenue—even indirectly.

It also appears from the bill of complaint—

1. That the order affects *class rates only*, for the carriage of commodities *between points within the state of Oregon*;

2. By its terms it provides: "*Nothing in this order contained shall be construed to apply to interstate commerce being carried on by said Southern Pacific Company over any line of railroad aforesaid.*" As has been pointed out, the alleged interference with interstate commerce is created through the method used in making rates from points outside of the state to points in Oregon over the lines of the Southern Pacific Company by said company, which is generally the terminal rate to Portland plus the local out of Portland to destination; the result being that it is alleged a reduction in a state rate necessarily reduces an interstate rate. Therefore the state has no control over the state rate. As the Interstate Commission has not control over state commerce, it necessarily follows that as to

this traffic the railroad is sovereign, and not the state, and state traffic is indeed in a "twilight zone" drifting about without compass or rudder.

AUTHORITY OF STATE OVER INTERNAL COMMERCE IS SOVEREIGN.

Before discussing the facts alleged in the bill, we will recall to the court's attention the points urged by these appellees more fully in their argument filed in *Oregon Railroad & Navigation Company v. Campbell*, No. 424, which stands for submission along with the present case.

The authority of the state in the regulation of its purely domestic commerce is sovereign, and co-ordinate with that of the federal government in the regulation of interstate commerce. Necessarily at times there is interference, but if merely indirect or incidental, the constitution is not violated. It is only the direct interference by the state with interstate commerce that is inhibited. The regulation of domestic commerce is exclusively a state function, and may be exercised directly by the legislature or through an agent. See authorities cited on pp. 52 and 53 of brief in *O. R. & N. Co. v. Campbell*, No. 424.

In *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204, 209, in speaking of the relative domains for state and federal activities, Mr. Justice Brown says:

"First, those in which the power of the state is exclusive; second, those in which the state may act in the absence of legislation by

Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all. The first class, including all those wherein the states have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the state, and while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference * * *."

"There can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation may be carried on by means of a commission."

Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 393.

"It cannot be doubted that the making of rates for transportation by railroad corporations along public highways between points wholly within the limits of a state is a subject primarily within the control of that state."

Smyth v. Ames, 169 U. S. 466, 521.

As said by the present Chief Justice, in *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 19, the elementary proposition that railroads are subject, as to their state business, to state regulation, cannot be successfully questioned in view of the long line of authorities sustaining the doctrine.

The principle as stated by the court through Mr. Justice Day is:

"* * * A state or territory has the right to legislate for the safety and welfare of its people, and that this right is not taken from it

because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority by the legislature is in conflict with an act of Congress, or is an attempt to regulate interstate commerce."

New Mexico ex rel. McLean v. Denver & R. G. R. Co., 203 U. S. 38, 49.

The exclusiveness of the jurisdiction of the state over its internal commerce, and the inability of congressional legislation to act thereon, are pointed out in the recent decisions in

Oklahoma v. Atchison T. & S. F. R. Co., 220 U. S. 277, 285.

Oklahoma ex. rel. West v. Chicago, R. I. & P. R. Co., 220 U. S. 302, 306.

In a case involving the control of the state over intrastate commerce, the Supreme Court in *Missouri P. R. Co. v. Kansas ex rel. Taylor*, 216 U. S. 262, 283, referring to one of the propositions advanced, said:

"2. That the order was void because it operates a direct burden upon interstate commerce.

"To support this proposition it is urged that the charter of the Interstate Railroad Company, the builder of the branch, provided for a road not only in Kansas, but to extend into Texas and Missouri, and therefore for an interstate railroad. This being its character, the argument proceeds to assert that the regulation of traffic on the road, whatever be the nature of the traffic, was interstate commerce,

and beyond the control of the state of Kansas. But this simply confounds the distinction between state control over local traffic and federal control over interstate traffic.

"To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation, unless, at the same time, it was held that the incorporation of the road had operated *to extend the powers of the government of the United States to subjects which could not come within the authority of that government consistently with the Constitution of the United States*. Manifestly, the mere fact that the charter of the road contemplated that it should be projected into several states did not change the nature and character of our constitutional system, and therefore did not destroy the power of Kansas over its domestic commerce, or operate to bring under the sway of the United States matters of local concern, and of course could not project the authority of Kansas beyond its own jurisdiction. The charter therefore left the road for which it provided subject, as to its purely local or state business, to the authority of the respective states into which it was contemplated the road should go, and submitted the road as an entirety, so far as its interstate commerce business was concerned, to the controlling power conferred by the constitution upon the government of the United States." (*Italics ours*).

Mr. Justice White (with him concurring Chief Justice Fuller, and Justices Peckham and Holmes), said in 193 U. S. 394 in the *Northern Securities* case:

"Where an authority is exerted by a state which is within its power, and that authority as exercised does not touch interstate commerce or its instrumentalities, and can only have an effect upon such commerce by reason of the reflex and remote results of the exertion of the lawful power, it cannot be said, without a contradiction in terms, that the power exercised is a regulation, because a direct burden upon commerce. *To say to the contrary would be to declare that no power on any subject, however local in its character, could be exercised by the states if it was deemed by Congress or the courts that there would be produced some effect upon interstate commerce.* The question whether a burden is direct and therefore constitutes a regulation of interstate commerce is to be determined by ascertaining whether the power exerted is lawful, generally speaking, and then by finding whether its exercise in the particular case was such as to cause it to be illegal, because directly burdening interstate commerce. If in a given case the power be lawful and the mode in which it is exercised be not such as to directly burden, there is no regulation of commerce, although as an indirect result of the exertion of the lawful power some effect may be produced upon commerce. In other words, where the power is lawful but it is asserted that it has been so exerted as to amount to a direct burden, *there must be, so to speak, a privity, between the manifestation of the power and the resulting burden.*"

**REMOTE OR INDIRECT INTERFERENCE
WITH INTERSTATE COMMERCE NOT
SUBJECT TO CONDEMNATION.**

That the exercise of legislative power by state authority may in operation have an effect upon interstate traffic does not of itself invalidate the state enactment ought not to admit of dispute.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 488.

Martin v. West, 32 Sup. Ct. Rep. 42.

The interference with interstate commerce which is contrary to the constitution is a direct interference, not that which is indirect or remote. This has been so often held by the court that citation of authority would seem unnecessary. In our argument in *O. R. & N. v. Campbell*, No. 424, on pages 66 and 67 we have cited numerous decisions of this court which are in point.

As the discriminatory character of the rates in the rate schedule of appellants condemned by the Oregon Commission is uncontroverted in the bill, it is to be noted the court has considered the effect of a legislative prohibition of discrimination:

"It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be

direct, and not the merely incidental effect of enforcing the police powers of the state."

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 518.

See also

Alabama & V. R. Co. v. Mississippi Railroad Commission, 203 U. S. 496, 500.

Missouri Pac. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612.

It has been suggested that *Southern Railway Company v. The United States*, decided October 30, 1911, 32 Sup. Ct. Rep. 2, — U. S. —, has modified or overruled the law as announced by this court substantially from its foundation, and that the court has substantially eliminated state authority over intrastate commerce; or, to express it in another way, Congress in effect has control over all commerce.

We do not believe the decision justifies any such construction.

To construe it so is to assume that without discussion, without the citation of a single authority, an entire body of authorities have been set aside, an act of Congress nullified, and, indeed, the Constitution itself held for naught.

The case was decided on the "real and substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic, and the object which the acts obviously are designed to attain, namely, the safety

of interstate commerce and of those who are employed in its movement."

In other words, it was the direct effect, and not the indirect or incidental effect the court was considering.

CONGRESS IS WITHOUT AUTHORITY DIRECTLY TO REGULATE THE PURELY INTERNAL COMMERCE OF THE STATES.

This is stated by Mr. Justice Moody to be his understanding of the opinion of every member of this court. Any other construction would, as stated by Mr. Chief Justice White, "obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

Howard v. Illinois Cent. R. Co., 207 U. S. 463, 502, 505.

CONGRESS HAS EXPRESSLY NEGATED ANY INTENTION OF INTERFERING WITH STATE COMMERCE.

As shown in our argument in *O. R. & N. v. Campbell*, No. 424, on pages 60-62 inclusive, it is shown that the 61st Congress declined to strike out the proviso in section 1 of the act to regulate commerce, which exempts the transportation of property wholly within a state from the operation of the act. The debates show this congressional action was taken on the ground that omission of the pro-

viso might, under the doctrine in the *Employers' Liability Case*, make the whole act unconstitutional as an unwarranted interference with state commerce.

INTERPRETATION OF FEDERAL AUTHORITY BY INTERSTATE COMMERCE COMMISSION.

We have discussed this phase of the question on pages 62 to 65 inclusive of our brief in *O. R. & N. Co. v. Campbell*, No. 424. Without repeating the citation of decisions of the Interstate Commerce Commission there contained, it is enough to say that tribunal has declined to assume any jurisdiction over commerce which begins and ends in a single state, even when it is alleged the local rates touched upon or interfered with interstate commerce.

Thus, in a case strikingly similar in principle to that involved here, it held carriers had a right to advance local charges irrespective of the through rate under control of the commission. If an order required the through rate should not exceed the sum of the locals, the carriers could advance the locals and thus defeat the order. The only way to overcome this would be for the commission to name the through rate—it would have no control on the local rates.

Michigan Buggy Co. v. G. R. & I. Ry. Co., 15 I. C. C. Rep. 297.

As to state control over rates which even involve interstate rates, see, in addition to cases cited on

page 62 of argument in *O. R. & N. Co. v. Campbell*, No. 424:

Kurtz v. Pennsylvania Co., 16 I. C. C. Rep. 410.
Saunders & Co. v. Southern Express Co., 18 I. C. C. Rep. 415, 422.

Wells-Higman Co. v. Grand Rapids & I. Ry. Co., 19 I. C. C. Rep. 487, 490.

The Interstate Commerce Commission does not regard rates made by statute authority as necessarily fixing the measure of an interstate rate.

Saunders & Co. v. Southern Express Co., 18 I. C. C. Rep. 415, 421.

Hope Cotton Oil Co. v. T. & P. R. Co., 12 I. C. C. Rep. 265, 269.

Then why should the state be bound to accept interstate rates as the measure of its state rates? This would amount to a complete abdication of the sovereignty of the state as respects its own domestic commerce.

If the formula for making an interstate rate is such that a regulation of a purely state rate necessarily interferes with interstate commerce, then the regulation of that interstate rate by congressional authority would also necessarily affect the purely intrastate rate and Congress would have no power in the premises. The argument proves too much.

CONCLUSIONS DEDUCED FROM THE AUTHORITIES REFERRED TO.

It therefore appears:

(a) The power of the nation is supreme and exclusive so far as respects interstate commerce;

(b) The power of the state is supreme and exclusive so far as respects intrastate commerce;

(c) The interference by a state with interstate commerce or by the nation with intrastate commerce must be direct and not indirect, or incidental;

(d) Congress has expressly recognized the rights of the state in this control and has affirmatively exempted state traffic from the operation of the act to regulate commerce.

FACTS PLEADED IN THE BILL.

Having discussed substantially all the constitutional questions presented by the bill, we turn to the facts.

This case stands on the bill and the demurrers to it. In considering the sufficiency of the bill and the effect of appellees' demurrer, the usual rules apply: the complaint must contain a full, accurate, clear, certain and positive statement of ultimate facts. The interpretation of an ambiguous clause least favorable to the plaintiff is to be adopted. The argumentative or hypothetical is forbidden.

Defendants' demurrers admit only facts which are well pleaded, not matters of inference or argument, nor the construction of the state act, nor of the Commission's order which the pleader sees fit to ascribe when those documents are part of the bill. Nor do defendants' demurrers admit matters within the court's judicial knowledge nor facts repugnant to each other; nor does the admission go to conclusions of law.

An allegation that a rate is unreasonable and if enforced will result in large loss of revenue is not admitted by demurrer.

Reagan v. Farmers' L. & T. Co., 154 U. S. 362, 401.

Central of Ga. Ry. Co. v. McLendon, 157 Fed. 961, 977.

B. C. R. & N. Ry. Co. v. Dey, 82 Iowa 312, 343.

Missouri Pac. R. Co. v. Smith, 60 Ark. 221.

See also

Cincinnati, etc., Packet Co. v. Catlettsburg, 105 U. S. 559.

DOES THE ORDER IN FACT INTERFERE WITH INTERSTATE COMMERCE?

The court will judicially notice that Portland is by far the largest city in Oregon, the commercial, distributing, and financial center of a large section of country. It is the terminal of a number of trans-continental railways. It is at the head of deep sea navigation, and at the junction of the Columbia and Willamette rivers, both of which are navigable for a considerable distance. A number of lines of steamers, both regular and independent, operate between Portland and San Francisco; regular lines also operate between Portland and Atlantic coast points. It is therefore a large transportation center and to and from some territories highly competitive. The appellants' railway is the only means of transportation for a large part of the territory in Oregon south of Portland.

The importance to appellants to be able to name rates on state traffic between points within the state over its lines, whether originating in Oregon or brought to Portland or any other point on its lines of railway, free from interference of any regulative authority, is apparent. The Interstate Commerce Commission has no authority, and without amendment to the federal Constitution can have no authority to regulate state traffic. If it is held any change in a local rate that may in anywise affect a through rate is an interference with interstate commerce, then the state will be deprived of all power of rate control. There never will be difficulty in using local rates within the state as part of through rates or making through rates based on some point like Portland.

Paragraph 9 of the complaint (Rec., p. 26) contains the statement as to how rates on interstate commerce will be affected by the order and in brief is as follows:

1. The Union Pacific system handles interstate commerce into Portland and East Portland; that the Northern Pacific Railway and other railways handle interstate commerce into Portland; that the Southern Pacific Company handles interstate commerce into Portland and East Portland; that all of these lines handle interstate traffic to points on the Southern Pacific lines in Oregon, applying to this traffic the local rates from Portland to points of destination, i. e., in fixing a rate to a Willamette Valley point in Oregon the rate would be found by

adding to the interstate rate to Portland, *the local rate from Portland to point of destination.*

2. That the traffic handled by the Southern Pacific Company from California points to points in Oregon is affected by water competition and the reduction in class rates prescribed by the order affects the movement of said traffic. We presume the pleader means that there is some relationship between rates on direct rail shipments and by water to Portland and thence by rail, and to change the local rate from Portland disturbs this relationship. This would be just as true if the ocean rate were changed.

3. Tariffs are referred to under which freight moves to points on the lines of the complainants in Oregon, and it is alleged the tariffs are on file with Interstate Commerce Commission.

4. Rates are made from California points to Oregon points on the lines of the Southern Pacific Company by using the ocean competitive rate from San Francisco and bay points and the local class rates out of Portland to destination. That a reduction in the local rates necessarily reduces the through rate.

5. That local class rates out of Portland are used as basing rates on interstate traffic from California points south of Marysville in California, and in every other state in the Union the through rate is made by adding to the rate applying from Portland the class rate from Portland to destination.

6. Other interstate rates use the present local rates as arbitraries to be added to the class or com-

modity rates applying to Portland over routes which do not require the traffic to be transported through Portland.

Certain illustrations are given showing the effect on interstate rates if the local rates are changed. One is worth more than passing notice. It is on a movement of syrup from San Francisco to Eugene, Oregon (Rec. 32). Appellants show because the rate to Eugene is based on water competition to Portland, an all-rail rate of 71 cents per hundred in less than carloads and $44\frac{1}{4}$ cents in carloads from San Francisco to Portland results, and that the reduction in the intrastate rate from Portland to Eugene reduces this through rail rate to Eugene from San Francisco from 71 cents to 63 cents per hundred and the carload rate from $44\frac{1}{4}$ cents to $34\frac{1}{4}$ cents per hundred; and the bill then refers to the long haul and low resulting *all rail rate* from San Francisco to Eugene.

Just what conclusion appellants desire the court to draw from these facts is not clear. Possibly they expect the court to shut out water competition. Because the Pacific ocean forces a low water rate to Portland, and the combination of water and rail in turn forces a low through rail rate to Eugene from San Francisco if the railroad desires to haul all rail, certainly furnishes no justification for the maintenance of an unreasonable local rate from Portland to Eugene.

That is but the result of the working of natural laws, and yet it seems to be expected to prevent an inevitable and natural effect, the court can and

should in some way maintain high local rates on state traffic from Portland to Eugene, so as to enable complainant to charge a higher all rail rate from San Francisco to Eugene. This of course could only be done by finding the Railroad Commission has no authority over rates between Portland and Eugene. It would be indeed a peculiar exercise of any court or administrative function to attempt to deprive the public of water competition or defeat natural competition by forcing the maintenance of unreasonable and discriminatory local rates because of it.

Reduced to its last analysis the bill simply alleges interstate rates into Western Oregon over its lines are largely made by using the Portland rate as a base and adding to it the local rate. Therefore the local rate cannot be changed because it will affect the through rate and therefore on domestic commerce they can charge what they see fit, provided that the sum of the two rates do not exceed a reasonable through rate—over which *through rate only* the Interstate Commerce Commission would have jurisdiction.

A mere statement of the proposition refutes it.

COMPETITIVE LINES OF TRANSPORTATION.

There are a number of steamers operating between California points and Portland and there are shipments by both rail and sea from points of eastern origin to Portland.

This competition might very naturally result in competitive rates to Portland, but because appel-

lants compete with other carriers and name through rates, with the local rate in Oregon as one of the factors, is the state to be deprived of the right to enjoy reasonable rates on domestic traffic? Is a shipper, who chooses to employ a competing line to Portland, to be deprived of a reasonable rate to distribute goods from his stock in trade? Is the public to be deprived in a measure of the benefits of water or other competition by the maintenance of unreasonable local rates because of it? Are the people on the line of appellants' railway in Oregon to be charged unreasonable rates on domestic traffic because appellants choose to use the local rate as a factor in making a through interstate rate?

The underlying theory of the bill is that, if a carrier at any time uses a local rate as a part of a formula in arriving at a through rate, no matter how unreasonable and therefore unlawful a local rate may be, no authority can change it, as an interstate rate would be affected.

It is an attempt to defeat all state control over state rates, and to control the state rates through an interstate rate by using the local rate in arriving at the interstate rate. This fact will be elaborated when that point is discussed.

MATTERS OF FACT AFFIRMATIVELY SHOWN BY THE ORDER AND COMPLAINT.

a. The rates in controversy are class rates only over the lines of the appellants between points within the state of Oregon.

b. There was a full hearing and investigation in which appellants were represented and participated.

c. No jurisdictional defect or abuse of power is alleged.

d. After due investigation and consideration of all the facts the Commission found the rates complained of unreasonable and unjustly discriminatory.

e. The Commission fixed class rates which it found to be just and reasonable and non-discriminatory over the appellants' main and branch lines on traffic between Portland and other points within the state of Oregon south of Portland.

f. The order applies to class rates only over the lines of appellants within the state of Oregon.

g. The order is not to affect any interstate commerce.

h. The rates prescribed became effective twenty days after the service of the order.

No complaint is made as to any jurisdictional defects or denial of any right or opportunity to be heard. There is no suggestion of newly discovered evidence, that the evidence did not justify the findings, that there are any facts not presented to the Commission upon which appellants will rely, or that all the facts were not submitted to the Commission.

The changes made by the order affect class rates only within Oregon, between Portland and points south thereof, as shown in section 1 of the Southern Pacific Company's Local and Joint Freight Tariff

No. 235-A. In that book of rates are published the particular rates in question as well as many other rates.

The portions of the order necessary to the consideration of this question have already been set out in this brief (page 7), *ante*, to which we refer the court at this point for greater certainty as to its language. (See Record, pp. 5-25).

Just what phraseology is required to confine an order made by a state commission to state rates, we do not apprehend. While it did not add to or detract from the operation of the order to declare explicitly it referred only to intrastate commerce, in order that there could be no question even as to the intent of the Commission or scope of the order it is set forth therein:

"Nothing in this order shall be construed to apply to interstate commerce being carried on by said Southern Pacific Company over any of the lines of railroad aforesaid."

It is not claimed this statement would change a fact or that the court would not consider the substance rather than the form of the order. On the other hand the court will not presume the state is trying to act unlawfully. There is no reason for the claim that the decision of the Commission is an unlawful interference with interstate commerce, as by its terms it is limited to shipments from one point to another within the state, and cannot be construed to affect, nor as an attempt to affect, interstate commerce.

Railroad Commissioners v. Symms Grocer Co.,
53 Kans. 207, 216.

If the order were attempted to be applied to interstate commerce, the attempt would fail and the lawful interstate rates would apply.

If made, it would be of no importance, for relief would follow instantly. No language used by the Commission could add to its powers. Nor can the order be made to govern that to which it cannot lawfully apply.

There is no distinct allegation that the order in itself in any way attempts to fix or regulate interstate rates, but all that is claimed is that the effect of the order will be to regulate them to some extent.

In the case of *O. R. & N. Co. v. Campbell*, 173 Fed. 957, before the Circuit Court below, the order then in question was criticised by the railroad company affected because it did not by its terms limit its effect to intrastate traffic.

Discussing this objection at page 981 the court says:

"The order is not specific, however, in this: That it does not, in direct terms, say that the rates so fixed shall apply to the transportation of intrastate commerce only; but, considering that the Commission is a state organism, imbued with authority to fix rates within the state and not beyond its confines, it is but a legitimate deduction that its purpose in promulgating the order was to prescribe rates effective as relating to intrastate, and not interstate commerce. Presumptions are always in favor of the lawful exercise of a power—not that it was unlawfully exercised, or that a functionary has exceeded the authority delegated or bestowed. So that, as matter of law,

neither in the intendment of the act, nor in the draft of the order, has there been an invasion of the right and power of Congress to regulate commerce between the states."

Every presumption and rule of construction is in favor of the interpretation of the order so as to sustain it and avoid the direct interference with interstate commerce which would invalidate it.

Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa 312, 339.

Chicago, I. & L. R. Co. v. Railroad Commission, — Ind. —, 95 N. E. Rep. 364, 368—
citing

New York Central, etc., R. Co. v. Interstate Commerce Commission, 168 Fed. 131.

Pittsburg, etc., R. Co. v. Railroad Comm., 171 Ind. 189.

Chicago, etc., R. Co. v. Railroad Comm., 173 Ind. 469.

Stone v. Farmers' L. & T. Co., 116 U. S. 307.

**GULF, COLORADO & SANTA FE R. CO. V.
TEXAS DECISIVE THAT FACTS STATED
SHOW ONLY REGULATION OF
STATE RATES.**

The case of *Gulf, Col. & Santa Fe R. Co. v. Texas*, 204 U. S. 403, is controlling and decisive as to this question.

The court will recall the facts. There was a sale of two cars of corn for delivery at Goldthwaite, Texas. Vendor contracted with a Kansas City firm for the purchase of two cars of corn to be delivered to it at Texarkana. It was vendor's in-

tention all the time that the corn should be shipped to Goldthwaite from Texarkana, and this because of the combination of rates which existed.

The through rate from Kansas City to Goldthwaite via Texarkana was 35 cents.

The interstate rate from Kansas City to Texarkana was 18 cents, and the state rate, fixed by the state commission, from Texarkana to Goldthwaite 14 cents—total 32 cents, or three cents less than the through interstate rate, 35 cents. When the cars reached Texarkana, the original bills of lading were surrendered and the same cars forwarded under new bills of lading to Goldthwaite. The cars were never unloaded, nor the seals broken, and the corn was transported in the original cars without breaking bulk to Goldthwaite. At Goldthwaite the consignee tendered the charges prescribed by the state railroad commission, which the agent declined to accept and demanded and collected a larger sum. The railroad company was fined by the state court for extortion and the case was taken to the Supreme Court of the United States on a writ of error. Manifestly, the penalty imposed for violation of the state statute could not withstand attack if it unconstitutionally interfered with interstate commerce.

In passing upon the case, the court, speaking by Mr. Justice Brewer, stated the issue (page 411):

"The single question in the case is whether, as between Texarkana and Goldthwaite, this was an interstate shipment. If so, the regulations of the state railroad commission do not

control, and the court erred in enforcing the penalty. If, however, it was a purely local shipment, the judgment below was right and should be sustained."

The court in passing upon the case *inter alia* said:

"It is, however, contended by the railway company, that this local transportation was a continuation of a shipment from Hudson, South Dakota, to Texarkana, Texas; that the place from which the corn was started was Hudson, South Dakota, and the place at which the transportation ended was Goldthwaite, Texas; that such transportation was interstate commerce, and its interstate character was not affected by the various changes of title or issues of bills of lading intermediate its departure from Hudson and its arrival at Goldthwaite. * * * The first contract of shipment in this case was from Hudson to Texarkana. * * * When the Hardin Company accepted the corn at Texarkana the transportation contracted for ended. The carrier was under no obligations to carry it further. It transferred the corn, in obedience to the demands of the owner, to the Texas & Pacific Railway Company to be delivered by it, under its contract with such owner. * * * *Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a matter immaterial so far as the completed transportation was concerned.*

"In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had

purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled, on his arrival at Texarkana, to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. *The one contract of the railroad companies having been finished, he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the state within which that carriage was to be made.*

"It must further be remembered that no bill of lading was issued from Texarkana to Goldthwaite until after the arrival of the corn at Texarkana, the completion of the first contract for transportation, the acceptance and payment by the Hardin Company. In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it has made, know whether it was bound to obey the state or federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract. It must be remembered that there is no presumption that a transportation when commenced is to be continued beyond the state limits, and the carrier ought to be able to depend upon the contract which it has made, and must conform to the liability imposed by that contract." (*Italics ours*).

In *Southern Pacific Terminal Co. et al. v. The Interstate Commerce Commission et al.*, 219 U. S.

498, appellant Southern Pacific Company was one of the appellants.

In that case the appellants were attacking an order made by the Interstate Commerce Commission on the grounds *inter alia* that the commission by the order assumed to control and regulate intrastate commerce, citing *Gulf, C. & S. F. Ry. Co. v. State of Texas*, *supra*, and *Coe v. Errol*, 116 U. S. 517, in support of their contention. The court, however, held that under the facts it was commerce subject to the act to regulate commerce and that the authorities cited did not apply.

The Interstate Commerce Commission has uniformly followed *Gulf, C. & S. F. R. Co. v. Texas*. It recognizes the right of the shipper to consign his shipment where he will, pay the charges on it, take possession, and later reship under the rates lawfully applicable to this last movement, even if such rate be a local state rate, and the result (as in *Gulf, etc. v. Texas*) be a lesser rate than the published interstate rate. The latter shipment, if within the limits of a single state, is intrastate. This rule is applied in the transportation of both persons and property.

Morgan v. M. K. & T. Ry Co., 12 I. C. C. Rep. 525, 528.

Montgomery Freight Bureau v. Western Ry. of Alabama, 14 I. C. C. Rep. 150.

Marshall Oil Co. v. Chicago & N. W. R. Co., 14 I. C. C. Rep. 210.

Kurtz v. Pennsylvania Co., 16 I. C. C. Rep. 410, 412, 413.

Dobbs v. Louisville & N. R. Co., 18 I. C. C. Rep. 210.

When the charge and the actual transportation are confined to the limits of the territory of the state, it is not interstate commerce and is subject to state control.

Wabash, St. Louis & Pacific R. Co. v. Illinois, 118 U. S. 557.

Illustrations of goods which are to be treated as having a *situs* in the state, and not in transit, though shipped in from another state and awaiting sale or movement elsewhere locally, are found in *General Oil Co. v. Crain*, 209 U. S. 211, 228-9. *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 509.

The confusion which seems to exist between the fixing of a state rate and the question of the applicability of that rate to a particular shipment is pointed out in

Southern R. Co. v. Hunt, 42 Ind. App. 90, where it is held that in fixing local freight rates on coal, the fact the coal was interstate traffic did not affect the jurisdiction of the Commission to fix rates, since it was the local rate, and not a particular shipment, which was in controversy.

A CARRIER USING A LOCAL RATE AS PART OF A THROUGH INTERSTATE RATE DOES SO KNOWING IT TO BE SUBJECT TO STATE CONTROL.

The law requires all rates to be reasonable, state as well as interstate, and if a carrier uses a local

rate in any way as a factor in arriving at an interstate rate, it does so knowingly and subject to state control.

In *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, it was claimed that because the corporation was incorporated under an act of Congress, its operations were removed from the control of the state. Passing upon this point the court said:

"There is nothing in the enforcement by the state of reasonable rates for transportation wholly within the state which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation Congress authorized the company to build its road through the state of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state and to other points also within the state, and that in so doing it would be engaged in a business, control of which is nowhere by the federal Constitution given to Congress. * * * We are of opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates and other police regulations."

In *Reagan v. Farmers' Loan & Trust Co.*, *supra*, will be found numerous statements sustaining state control. To the same effect see *Smyth v. Ames*, *supra*.

In the case of *Ames v. Union Pacific Railroad Company*, 64 Fed. 165, Mr. Justice Brewer, at page 171 of the opinion, says:

"Again it is insisted that this act interferes with interstate commerce, in two ways: First, it establishes a classification of freights different from that which prevails west of Chicago; and, in the second place, by reducing local rates, it necessarily reduces the rates on interstate business. Neither of these objections seems to me to be well taken. In the first place, the classification of freights by the railroads is a purely voluntary act, not compelled by any statute, and not uniform throughout the country. There is one system which prevails east of Chicago, and one west. It might be more convenient if the classification established by this act harmonized with that adopted by the railroad companies doing business west of Chicago; but surely the voluntary act of the railroad companies, in establishing a uniform classification for certain territory, can work no limitation on the power of the state to establish a different classification. To say, for instance, that because the railroad companies have voluntarily placed flour in a certain class, on which a specified rate is to be charged, such voluntary act of mere classification destroys the power of the state to establish a classification which puts flour in another class, and subject to another rate, is, to my mind, a most extravagant pretension. Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true the companies may, for their own convenience, to secure business, or

for any other reason, rearrange their interstate rates, and make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion. The statute of the state does not work a change in interstate rates, any more than an act of Congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own convenience, or the effects of competition between themselves and other companies, in restraint of the otherwise undeniable power of the state."

In *Armour Packing Company v. United States*, 209 U. S. 56, 82, the court says:

"If the shipper sees fit to make a contract covering a definite period, for a rate in force at the time, he must be taken to have done so subject to the possible change of the published rate, in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law."

A fortiori, if a railroad company sees fit to make a state rate any part of the formula in arriving at an interstate rate, it does so subject to possible changes made in the local rate by state law.

A RATE IS A DEFINITE CHARGE FOR A WHOLE SERVICE.

It appears by the tariffs referred to that many of the interstate rates of complainants would not be affected under any circumstances by the order of the Commission. We therefore arrive at a situation where as to some local rates the state has reg-

ulative power, but as to others it cannot exercise it, because they are used as a part of a through rate.

Beale & Wyman on *Railroad Rate Regulation*, Sec. 661, is to the effect that the sole, the only test under the law is a simple one: Is the interstate rate reasonable? If not, it is unlawful. Is the local rate reasonable? If not, it is unlawful. Not whether a terminal rate plus a local is a reasonable rate, or leads to a reasonable interstate rate. These questions do not concern a court. The question is a rate, not a formula. What is to be considered is the reasonableness of the whole rate, i. e., its lawfulness.

The argument or suggestion refutes itself and entirely loses sight of what a rate is. A rate is the "definite charge fixed by the person conducting public employment as the price demanded for performing the service asked. The most salient characteristic of a rate, considered abstractly, is that it is an entirety, the single charge for the whole service performed."

Yet in this case appellants not only seek to measure local by a through rate, but do more, *claim absolute control over it irrespective of its reasonableness.*

If their contention is sound, there is no limit to the local changes they might make through the operation of their formula.

It is conceded that the state has control over intrastate rates, but it is urged this control can be eliminated by the simple expedient of using a local

rate as one of the factors in framing an interstate rate.

In *Trammel v. Clyde Steamship Company et al.*, 4 I. C. C. Rep. 120-139, the Interstate Commerce Commission says:

"Traffic is either state or interstate traffic according to its origin and destination. It is shipped by the consignor in the state where the consignee dwells, or it is not. If not, it is interstate traffic, and when carried over two or more lines it is, by the fact of having been received, forwarded and delivered as one through shipment, transported under a common control, management or arrangement, as the case may be, for continuous carriage or shipment. * * *

"The addition of a local rate to a reasonable through rate in order to fix the through charge to the local station is liable to produce a relatively unreasonable rate to that station. The difference in situation of the basing and local points in respect of through traffic is not properly measured by the local rate for carriage between them. The reasonableness of the added local, *as a local rate, is not under consideration in a case where the rate complained of is the total charge over different lines.* The total rate or charge for through carriage over two or more lines, whether made by the addition of established locals, or of through and local rates, or upon a less proportionate basis, is the through rate that is subject to scrutiny by the regulating authority; *how the rate or charge is made is only material as bearing upon the legality of the aggregate charge, and how*

any reduction ordered may be accomplished, whether by lowering locals or proportions, is matter for the carriers to determine among themselves."

See also

Wells-Higman Company v. Grand Rapids Indiana Railway Co., 19 I. C. C. Rep. 487.

Dobbs v. L. & N. R. R. Co., 18 I. C. C. Rep. 210.

Assuming that the rates in controversy fixed by the Oregon Commission are reasonable and lawful as to intrastate traffic (and this is what appellants concede under the law they must be), appellants' contention would lead this court to say that the law appellants admit must be observed, shall be violated, and the officers of the state be enjoined from complying therewith and the people of the state be deprived of what under the law they are entitled to, at the option of the railroad. The decisions on this question under anything like similar conditions are unanimous against the position taken by the complainants. Such a proposition, in the language of the court, "simply confounds the distinction between state control over local traffic and federal control over interstate traffic. To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation."

Wabash, St. Louis P. R. R. Co. v. Illinois, 118 U. S. 557.

Missouri Pac. R. Co. v. Kansas, 216 U. S. 262, 284.

Gulf, Colorado & Santa Fe Railroad Company v. Texas, 204 U. S. 403.

General Oil Co. v. Crain, 209 U. S. 211.

Ames v. Union Pacific R. Co., 64 Fed. 165-171.

St. Louis & S. F. R. Co. v. Hadley, 168 Fed. 317.

Southern Ry. Co. v. Hunt, 42 Ind. App. 90.

State v. Mo. P. Ry. Co., 76 Kan. 467.

Morgan v. M. K. & T. Ry. Co., 12 I. C. C. Rep. 525-528.

Lincoln Commercial Club v. C. R. I. & P. R. Co., 13 I. C. C. Rep. 319.

Montgomery Freight Bureau v. Western Ry. of Ala., 14 I. C. C. Rep. 150.

Marshall Oil Co. v. C. & N. W. Ry. Co., 14 I. C. C. Rep. 210.

It is clear, from the authorities cited, the order is not a direct interference with interstate commerce, and that the interference is only indirect and at the option of appellants who are under no legal or practical compulsion to use any particular formula in arriving at a through interstate rate, or any formula at all which involves the unstable element of a local rate.

From any view point one may examine it the proposition is sophistical and unsound.

The court is dealing with a case wherein reasonable rates have been fixed for state commerce in the manner provided by law. The court is asked to set aside this order and enjoin the collection of reasonable rates for state traffic, to declare a lawful rate unenforceable and to decree that unlawful

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rates can be exacted on all state commerce because of an alleged interference with some interstate commerce.

THE CIRCUIT COURT'S DECISION.

On this branch of the case and the alleged unconstitutionality the court below (page 55, Rec.) said:

"A large part of the discussion herein is directed to the constitutionality of the Railroad Commission act, and the contention that the order sought to be enjoined directly and materially affects interstate commerce. Both of these questions were considered and decided by this court in the *Campbell* case (*Oregon R. & N. Co. v. Campbell*, 173 Fed. 957). The opinion of Judge Wolverton in that case contains such an exhaustive, satisfactory and full discussion of the subject as to leave nothing to be added. I fully concur in his views and am unable to distinguish this case in principle from the one decided by him. The averment in the bill that the order of the Commission interferes with interstate commerce is but the conclusion of the pleader and is not in harmony with the facts alleged. Morrow, Circuit Judge, says:

"A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the railroad company for interstate traffic. Upon adjustment the latter rate must yield." (*Woodside v. Tonopah & G. R. Co.*, 184 Fed. 360)."

In *Oregon R. & N. Co. v. Campbell*, 173 Fed. 957, at page 982, speaking of the alleged interference with interstate commerce, the court said:

"As has been previously shown, the Commission presumptively has acted within the scope of its authority, which was to prescribe rates applicable to the transportation of intra-state commerce only. But beyond this, it seems to be thought that if a state tariff affects an interstate tariff in the slightest measure, though incidentally, it must give way to the latter, and hence is void and inoperative. For instance, it is alleged that if the state Commission's rate becomes effective many persons will ship their commerce from without the state to Portland, and then reship to points east of The Dalles; or, in another way, wool will be shipped to Portland from points east of The Dalles, and thence east by the transcontinental rates, and thus the complainant will be compelled to re-establish its rates in order to retain its through haul from Eastern Oregon points. In other words, interstate traffic will thereby be interfered with, disturbed, and disarranged.

"It is, and always will be, a difficult question to determine as to when and what commerce should be classified as interstate, and when and what should be classified as intra-state. The question depends largely upon the facts and circumstances attending each case as it arises. There can be no doubt that commerce originating within the state and carried to some other point within the state is intra-state commerce. So it is of commerce originating within the state and transported, by continuous carriage, from within to some point

without the state, or originating without the state and carried within—that is to be classified as interstate commerce. But when intrastate becomes interstate commerce and *vice versa*, is an inquiry involving nice distinctions, perhaps. But we are not concerned with that at the present time. We are dealing with the distinct question of the supposed conflict between the regulation of interstate and intrastate commerce. Let us take a commodity, for instance, manufactured in Portland. Let it be agricultural implements. The state has a perfect and undoubted right to regulate the tariff for transportation of such commodity by rail to any part of the state from Portland, so that the tariff be reasonable; and I may say to any point on complainant's lines, within the state, east of The Dalles. If that regulation interferes with present tariffs for interstate transportation of the same commodity from common points east of the Mississippi or Missouri rivers to points on complainant's lines east of The Dalles, who can say nay? But to go a step farther: The same commodity may be shipped to Portland from without the state, and put in common stock. When the commodity thus comes to rest in the state, and is sold by the dealer for transportation from Portland to some other point within the state, it is as much intrastate commerce as the case just put, and the state may, with equal authority, regulate the freight tariff. This is a condition of which complaint is made lest it be that dealers will take advantage of the local rate, and, selling to customers within the state, ship first to Portland at the transcontinental rate, and thence out to the interior at the local

rate. A shipment from the east, *via* Portland, to a point within the interior of the state, would be interstate commerce; but whether such a shipment could be made to take the classification of interstate commerce by shipment to Portland in the name of the dealer, and then of intrastate classification by the dealer billing it out of Portland again to his patron in the interior, is another question, which we need not decide. It remains clear that whenever the commodity partakes of the characteristic of intrastate commerce, the state has the right to fix the rates of tariff for its transportation wholly within the state."

LATE CASES PASSING ON ALLEGED INTER-
FERENCE WITH INTERSTATE COMMERCE
BY ORDERS OF STATE AUTHORITIES
FIXING STATE RATES.

Of late a new line of attack upon railroad regulation has been developed. It appears in two forms, *first*, to establish the principle that rates made by either national or state authority must be fixed on a basis that will yield a reasonable net return on the reproductive value of a railroad based upon impossible and imaginary conditions.

This question is not in this case.

Second, to establish as a principle that the naming of an intrastate rate by state authority that in any way conflicts or interferes with or affects an interstate rate, however made, is an unlawful interference with interstate commerce, whether the result is a change in relationship of state and

interstate rates, or is a change in the routing or the movement of freight.

The reasons for this dual attack are apparent.

PURPOSE OF ATTACK TO ELIMINATE STATE COMMERCE FROM ANY REGULATIVE AUTHORITY.

It is evident Congress cannot regulate state commerce, the state cannot regulate interstate commerce; therefore, if the railroads can maintain their theory, the regulation of all state commerce is at an end. There is no difficulty whatever in making the facts fit the theory, so that in making any interstate rate the tariff rules will include a state rate, over which no authority would have control. This alone is the reason for this latest form of attack upon state regulation.

It is a mild statement that the results of such a doctrine, carried to their logical extremity, would completely revolutionize our political and commercial life, and effect the greatest change that has taken place in our system since the foundation of the Union.

In *Mo. Pac. R. Co. v. Kansas*, 216 U. S. 262, the court, in discussing a question involving this same principle, said (page 283):

"To sustain the proposition would require it to be held that the local traffic of the road was free from all government regulation."

In *Louisville & N. R. Co. v. Siler*, 186 Fed. 176, at page 200, the court, speaking to the identical question, said:

"The logic of the company's argument would release its local rates from governmental regulation altogether; for the United States could not fix the local rates, because they are local, and the state could not change them, because it would thereby cast a direct burden on interstate commerce. The inevitable effect would be that, so far as rate-making is concerned, the state railroad commission would have no reason to exist, and state regulation of state rates would become simply historic."

In *Re Arkansas Rate Cases*, 187 Fed. 290, 302, the court says:

"If complainant's contention is correct, transportation companies, so far as the exclusively internal commerce of a state is concerned, are beyond all control, either from the state or national government; for, as determined in *Gibbons v. Ogden*, *supra*, the constitution excluded that class of commerce from the powers vested in Congress by the commerce clause, and, as all state rates indirectly affect interstate rates, they are, if complainant's contention is right, also void. See also on this point the *Employers' Liability Cases*, 207 U. S. 463, 493.

"The result of such a construction would be that the states do not possess one of the most important powers inherent in every government. The adoption of such a construction by the courts would be justifiable only if any other would do violence to a plain provision of

the national Constitution or principles of law so firmly established by previous decisions of the highest court of the land that there is no longer room for construction. In the language of Mr. Justice Peckham in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 231:

"If neither Congress nor the state legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, state or national, which can legislate upon that subject or prohibit such contracts. This cannot be the case."

(The *Siler* and the *Arkansas* cases cited are now before this court on appeal).

The question before the court has been passed on directly in a number of cases, and in all but one the power of the state was upheld.

In the case of *State v. Northern Pacific Ry. Co.* (Sup. Ct. N. Dak), 120 N. W. 869, the judgment in which was affirmed by the Supreme Court of the United States in *Northern Pac. Ry. Co. v. North Dakota*, 216 U. S. 579, the state court held that a state statute fixing coal rates between points within the state, was not a regulation of interstate commerce as applied to interstate lines. The court said:

"It is finally urged by defendant's counsel that the act in question violates the interstate commerce clause of the federal Constitution. Their argument is necessarily predicated upon the assumption that state regulation of local rates on interstate lines amounts to an interference with interstate commerce, as the act assailed, upon its face, merely purports to es-

tablish maximum rates for transporting coal in carload lots between points within the state. This question is not open to debate, as the court of last resort in this country has repeatedly held adversely to counsel's contention."

After quoting from *L. & N. R. Co. v. Kentucky*, 183 U. S. 503, the court said further:

"It is but fair to counsel for defendant to state that they concede that, up to this time, the decisions of the United States Supreme Court on this point are uniformly opposed to their contention. Even if we were disposed to entertain the views expressed by Judge Lochren in *Perkins v. Northern Pacific R. Co. (C. C.)*, 155 Fed. 453, which we are not, we should feel it our duty, as did Judge Lochren, to yield to the judicial utterances of the final arbiter on this question."

That question was not discussed by this court in affirming the judgment, but it said the mere fact that the state court had held that the statute applied only to transportation wholly within the borders of the state disposed of the objection that the statute was a regulation of interstate commerce.

The case of *Woodside v. Tonopah & G. R. Co. et al.*, 184 Fed. 358, was heard by Judges Morrow, Farrington and Van Fleet.

We quote from the syllabus:

"A rate fixed by a state railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the railroad company for interstate traffic."

In the case at bar, the precise question presented in *O. R. & N. Co. v. Campbell* was submitted, and the court, by Bean, J., announced its full concurrence with the views as expressed in the opinion of Judge Wolverton in that case.

Shepard v. Northern Pac. Ry. Co., 184 Fed. 765, is the only case lending any countenance to appellants' contention. It is on this case appellants relied in the court below. On the face of the opinion it is apparent the facts are entirely different, for the court found interference with and discrimination against interstate commerce as well as confiscatory rates.

However, we would not be understood as approving the principles announced in that case either as to interference of the state rates with interstate commerce, or the basis of valuation used on which a return is to be allowed, as we are satisfied the effect of the *first* ruling will be to eliminate state rates from any control, and the *second*, to eliminate all state and interstate rates from any substantial control, unless it may be as to questions of discrimination.

COST OF SERVICE.

In the bill of complaint attacked by demurrer herein, no light is thrown on the cost of service, a most important consideration, none on the value of the property devoted to intrastate use, and that to interstate use, there is no allegation as to the cost of conducting state business as distinguished from interstate business, no division between passenger

and freight expenses. The sole allegations are as to the business as a whole and an allegation stating the amount of state and interstate freight revenue, and a general allegation that existing tariffs afford but slight compensation above the cost of service, which latter allegation, as will be shown later, is absolutely negated by the facts as pleaded.

It is but fair to assume that complainants have made as strong a showing as possible, and considering the failure to state any particular and necessary facts and the generality of their allegations and conclusions, with their admissions as to earnings, no cause of suit is stated in the complaint.

In discussing this very important question, as well as other features of the bill, the court below (Rec., p. 56) said:

"Whether rates prescribed by legislative authority to be charged by public service corporations are unreasonably low, within the doctrine stated, involves a determination of the value of the property of the complainant devoted to the particular public use to which the rates apply, the measure of a reasonable return thereon, and whether the rates allowed to be charged are sufficient to that end. These questions are complex, intricate, and often difficult of ascertainment, especially in the case of a carrier doing both local and interstate business. There is a difficulty, in the first place, in determining the value of the property as a whole, whether it is to be taken as the market value of the stock and bonds, the original cost of construction with expenses and permanent improvements added, the cost of reproduction, the

value of the property as a going concern, or whether all these matters are to be considered in fixing a fair value in a given case, and after the entire value of the properties has been determined, how it shall be divided among the several states through which the road passes. It is substantially agreed that where a railroad is used in both local and interstate business, and the value of the property devoted to public use within a given state is ascertained, that it is fair to apportion such value among the different kinds and classes of business upon a revenue basis, but it is not always easy to ascertain the revenue from interstate traffic. The records of a company commonly show the gross revenue from local traffic wholly within the state, but much of the interstate business is often carried through the state, and in other instances the local haul within the state is only a small proportion of the entire haul and it is therefore difficult to determine what should properly and rightfully be allowed for interstate traffic. But even greater difficulty lies in the apportionment of the cost of the service, between local and interstate business, so as to determine whether the revenues from a particular class are sufficient to afford a fair return upon the value of the property devoted to such class. There are many items of cost that disclose the class of business on account of which they are incurred, and can therefore be properly placed, but there is a large percentage of cost of doing all the business, like the maintenance of ways and structures, equipment, superintendence, operation of trains carrying both local and interstate traffic, which are incurred for the common benefit of both, and

there is no definite rule by which these items of common cost can be divided between the different classes with mathematical accuracy. *M. K. & T. R. R. v. Love*, 177 Fed. 493.

"These matters are not referred to because particularly material in the case in hand, nor with a design to approve or disapprove any particular rule or doctrine in reference thereto, but only to emphasize the position that a complainant seeking to enjoin rates fixed by lawful authority should state facts and not conclusions, facts which, if true, show that such rates will not or do not afford a fair return upon the value of the complainant's property devoted to the particular use. In the absence of such allegations, the presumption of law that the rates as made are fair, just and reasonable must prevail, and in my judgment the bill does not state facts sufficient to overcome this presumption."

PRESUMPTIONS AS TO PROFITABLENESS OF BUSINESS.

Under the pleadings with the facts as pleaded showing beyond question a very profitable business, the court cannot assume the rates as fixed by the order would be confiscatory or unremunerative. On the contrary all intendments and presumptions are in favor of the Commission. It will not be presumed a body created by law acted unlawfully—but the presumption is it acted lawfully, and that rates fixed by it are just and reasonable and consequently within its power.

ALLEGATIONS IN THE BILL AS TO THE UNREASONABLE CHARACTER AND EFFECT OF THE RATES FIXED BY THE ORDER.

The bill must be treated as an entirety. The order of the Commission, the Commission law, the tariffs are all made part of the bill.

By the order it appears after due hearing and investigation certain existing rates were condemned as unjust, unreasonable and discriminatory, and the rates named in the order, fixed and determined to be just, reasonable and non-discriminatory. Moreover, it appears that the entire schedule of rates was not under investigation or affected, but only commodities moving under class rates between Portland and certain points south thereof in Oregon.

The court below (Rec., p. 57) thus summarizes the allegations of the unreasonableness of the rates established by the order and their confiscatory character:

"It is alleged in general terms that the local rates of the complainant company affected by the order of the Commission were reasonable and just and as low as the situation of the properties and the competitive conditions of the business, both intrastate and interstate, 'will permit or allow, and the said compensation charged upon said existing tariffs is reasonable and just and affords to your orators but slight compensation above the cost of the service'; that the decreases attempted to be made by the Commission involve the class rates referred to and, if enforced, will deprive the complainant of a large sum of annual revenue

and compel it to give the use of its property without reasonable or just compensation, and will compel it to increase other rates upon traffic not affected by the order, and particularly upon products of the soil, forest and farm, many of which receive and enjoy terminal rates, including such commodities to be sold and consumed in the markets of the world, thereby compelling the complainant to discriminate against such last named products, to the great injury of the complainant and of the public; and that the order of the Commission is unreasonable, unjust and arbitrary and, if enforced, will deprive the complainant of earnings which it is entitled to collect and receive, in excess of the revenue that would be derived from the enforcement of the order; and 'that said pretended order is void and of no force and effect in this: that the rates sought to be prescribed by said order, in lieu of existing rates, are confiscatory of the property of your orators, and will deprive your orators of their property without compensation and without due process of law.' These averments are not sufficient to raise an issue. *Central of Ga. R. R. v. McLen-* *don*, 157 Fed. 961. They are but conclusions of law and are not supported by any averment of fact. Indeed, they are inconsistent with the facts alleged."

REDUCTION NOT GREAT.

An examination of the order set out in the record (pp. 17 to 34) will show on its face that radical reductions were not made. On the contrary it was more a lining up of the rates to remove discriminations than anything else. This led to reductions

but not of a radical nature. The court will observe that in but very few instances was the first class rate disturbed and but minor changes were made in a number of cases.

In order to aid the court in checking up the changes, should it deem it material, we submit a table showing rates condemned, rates established and difference between the rates at a number of representative points. Salem, Albany, and Corvallis are all situated on the Willamette river, where the rates are affected by water competitive conditions.

BETWEEN PORTLAND AND SALEM—53 Miles.

Classes—	1	2	3	4	5	A	B	C	D	E
Old Rates.....	24	21	18	16	14	14	12	9	7	6
New Rates.....	24	21	18	16	14	14	12	9	7	6
Amount of reduction	--	--	--	--	--	--	--	--	--	--

BETWEEN PORTLAND AND CORVALLIS—89 Miles.

Classes—	1	2	3	4	5	A	B	C	D	E
Old Rates.....	28	25	22	20	18	17	17	13	11	10
New Rates.....	28	25	21	19	16	16	14	11	8	7
Amount of reduction	--	--	1	1	2	1	3	2	3	3

BETWEEN PORTLAND AND COTTAGE GROVE—144 Miles.

Classes—	1	2	3	4	5	A	B	C	D	E
Old Rates.....	54	48	44	41	37	35	28	21	16	13
New Rates.....	54	46	38	32	27	27	22	16	14	11
Amount of reduction	--	2	6	9	10	8	6	5	2	2

BETWEEN PORTLAND AND ROSEBURG—198 Miles.

Classes—	1	2	3	4	5	A	B	C	D	E
Old Rates.....	72	64	59	55	50	45	36	25	18	15
New Rates.....	72	61	50	43	36	36	29	22	18	14
Amount of reduction	--	3	9	12	14	9	7	3	--	1

BETWEEN PORTLAND AND GLENDALE—263 Miles.

Classes—	1	2	3	4	5	A	B	C	D	E
Old Rates.....	95	83	77	71	64	58	46	29	22	19
New Rates.....	95	81	67	57	48	48	38	29	22	19
Amount of reduction	--	2	10	14	16	10	8	--	--	--

BETWEEN PORTLAND AND ASHLAND—342 Miles.

Classes—	1	2	3	4	5	A	B	C	D	E
Old Rates.....	123	107	95	91	82	74	58	34	26	23
New Rates.....	123	105	86	74	62	62	49	34	26	23
Amount of reduction	---	2	13	17	20	12	9	--	--	--

A reduction in rates does not necessarily decrease earnings.

Willcox v. Cons. Gas. Co., 212 U. S. 19, 51.

Knoxville v. Knoxville Water Co., 212 U. S. 1, 18.

Chic. & G. T. R. Co. v. Wellman, 143 U. S. 339.

VALUE OF PROPERTY ON WHICH RETURN IS CLAIMED.

Fortunately in this there is no involved question of law or fact to discuss. Appellants have set out explicitly the value of the entire property of the railroad on which they assert they are entitled to a return and fix the amount of the return they are entitled to.

They allege (Rec., p. 36) the property is of the reasonable value of a sum representing the outstanding bonds, deficit and capital stock of the company. These sums are stated as follows: (Rec., p. 33)

Preferred stock, par value	\$12,000,000.00
Common stock, par value	7,000,000.00
	<hr/>
	\$19,000,000.00
Bonded indebtedness, par value.....	17,745,000.00
Deficit (floating indebtedness)	3,207,008.83
	<hr/>
Total	\$39,952,008.83

We do not discuss the history of the bonds or stock or deficit and but little light is thrown on the details by the bill. It does appear that the \$7,000,000 common stock was long ago issued for interest on bonded indebtedness, etc., which had been permitted to default (Rec., pp. 35-36). For the purposes of this presentation it will be assumed the figures as alleged are its value.

At page 36 of the Record, it is alleged that appellants are entitled to earn enough from the properties to pay annual interest on the bonds at 5 per cent, interest upon the unsecured debt (referred to as a "deficit") of 6 per cent, and a dividend of 6 per cent or 7 per cent upon the capital stock. This is the return appellants claim they are entitled to. Any less under their theory would be confiscation *pro tanto*.

It will be noted *the figures represent all the properties of the Oregon & California Railroad Company, not the property devoted to the public use only*—and on all of it as represented by the figures they allege they are entitled to the return in question.

Reduced to figures this means appellants are entitled to a net return on the stock as follows:

7 per cent on 12,000,000 preferred capital	
stock	\$840,000
6 per cent on 7,000,000 common capital	
stock	420,000
	<hr/>
	\$1,260,000

RECEIPTS AND EXPENDITURES.

On page 36 of the Record will be found a statement showing all receipts and disbursements for the fiscal years ending June 30, 1902, to June 30, 1909—both inclusive. This tabulation in itself absolutely contradicts the allegation of confiscation.

It will be observed no light is thrown by the complaint upon the purpose of the expenditures. Under the terms of the lease (page 34, Rec.) the Southern Pacific Company was obligated "to keep the leased property in good order * * * operate, maintain, *add to and better the same at its own expense,*" etc. How much of the "deficit" is for "additions and betterments" and not chargeable to operation is not disclosed. That the account set out on page 36 of the Record represents *all* expenditures is plain. It is perfectly apparent that what appellants are attempting to do, is to require the people of Oregon to pay not only a fair return on the capital invested and the value of the property, but to repay the capital itself, under the guise of expenses, and the table demonstrates this is just

what has been done for a series of years. In other words, instead of paying dividends which might have been paid, they have reinvested the surplus and want the court to allow what might be termed extra dividends.

It affirmatively appears that *every dollar that was expended under the terms of the lease* on the property during the fiscal year ending June 30, 1909, including betterments, taxes, interest, every charge, amounted to \$5,839,698. The receipts for the same year were \$7,104,081, a *net return* which could have been applied to dividends of \$1,263,383—an amount more than equal to that required for dividends as claimed.

THE BILL IS SILENT AS TO RETURNS FOR YEAR 1910.

The bill is silent as to the earnings for the fiscal year ending June 30, 1910. The order attacked was not issued until September 21, 1910, and as the law requires the annual reports of carriers to be filed by September 15th, it is a fair presumption the Commission had the result of the year before them. The bill of complaint was not filed until October 12, 1910.

In the absence of a showing of results for the year then closed, the familiar rule that the pleading is most strongly taken against the pleader has particular force. The facts were peculiarly within the knowledge of the appellants and their failure to allege revenue, expenses, and earnings for the year 1910 is tantamount to a confession that, if shown,

they would negative the allegation of confiscation. The year was closed, and the court was entitled to have the year's business before it; and appellants no more met the duty to disclose current returns by showing 1909 business than if they had shown results for any other previous and more remote period of time. It might have been admitted that business was unremunerative in 1905 or 1909. *Cui bono?* How about 1910? The burden is on appellants—certainly not on the court or the state of Oregon.

The allegations that in the past appellants' earnings have been small and their business unremunerative do not and cannot affect this order.

There may be reasons for this for which the public is no wise responsible, as well as compensation in other possible directions therefor; and the public certainly does not guarantee that every investment made by a railroad shall be profitable.

Mathews v. Board of Corp. Com., 106 Fed. 7, 9, 10.

Steenerson v. Great Northern R. Co., 69 Minn. 353.

It is sufficient to say the Commission must make its orders under existing conditions. The question presented to the Commission is, are the rates complained of unjust and unreasonable *now*, not twenty years ago; are the rates prescribed confiscatory *now*, not, would they have been five, ten or twenty years ago.

RETURN ALLOWED.

The courts in a number of cases have determined as to the particular matter before them what would constitute a reasonable return, but more often they have declined to interfere with the rates fixed where it was alleged the return would be reasonably low.

As was held in *Willcox v. Consolidated Gas Co.*, 212 U. S., 19, 50, there is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. This depends upon circumstances, risk, usual return, etc.

On value of property and a reasonable return we refer also to

San Diego Land Co. v. Nat'l City, 174 U. S., 739, 757.

Under any circumstances the return allowed is only on the property devoted to the public use.

The rapid increase in earnings appears on the face of the bill and shows them to be constant, resulting from the gradual growth and development of the country.

ALLEGED LOSS OF REVENUE UNDER THE ORDER.

There are some errors in the bill as to the alleged loss occurring through repetition and duplication of figures, which were admitted by complainants (appellants) in argument below.

At page 37 of the Record, the loss under the order on intrastate business is estimated at \$120,859.32 and on interstate business of \$156,072.48, a total of \$276,931.80.

In the brief filed by complainants in the court below it is admitted "this aggregate thus alleged is an erroneous footing as the volume of interstate business is included in the preceding figures."

In other words the total estimated loss was \$156,072.48, not \$276,931.80. The total estimated loss is set out at the first named sum in the assignment of errors (Rec., p. 62).

It will be accepted by any one familiar with bills of this character, that the estimate is never understated.

But this is not all: with that careless disregard for figures shown in this class of cases, and notwithstanding the admitted error in the statement of the loss in paragraph X (Rec., p. 37), the alleged loss is still further exaggerated in paragraph XIV (Rec., p. 43), where it is alleged the property will be confiscated "to the use of the public in excess of about \$300,000 per annum," which allegation is later substantially repeated (Rec., p. 44).

Yet appellants argue that such statements as these in the same complaint are admitted by demurrer as true facts and present an issue to be tried. What is there to be tried? Admitting the loss shown, there is no confiscation, unless counsel mean, which they probably do, that any reduction in rates is *pro tanto* confiscatory.

Admitting that the difference in revenue directly and indirectly under the rates proposed will be \$156,072, as stated in the assignment of errors, or \$300,000 as finally swollen toward the end of the bill, and waiving the fact that much of the "expenses" is for additions and betterments made under the authority of the lease pleaded, what does it prove? As found by the court below, the bill shows there would still be left a handsome return on the investment.

Is there anything in these various statements that would justify a court in finding that the rates fixed by the Commission are unreasonably low or confiscatory or would warrant continuing in effect a discriminatory tariff?

Appellants do not contend they could show greater losses than the amount they allege and admit, \$156,072, which is probably grossly excessive. This being true, what purpose would be served by trial? If tried, what further light could be cast on the subject?

The weakness of the claim of confiscation is further demonstrated when the earnings as shown by the bill are considered in connection with alleged shrinkage in the revenue.

Under the facts one need not be surprised at the statement of the court below in referring to the allegations of confiscation (Rec., p. 58):

"Indeed they are inconsistent with the facts alleged."

And again (Rec., p. 58) :

"On this showing, it certainly cannot be consistently said that the earnings of the complainant, even after making the deductions alleged to be caused by the order complained of 'will afford but slight compensation above the cost of service,' or that the order of the Commission is confiscatory, or, in advance of actual experience, that the rates fixed by the Commission will not afford a fair return upon the value of the property."

Assuming that the reduction in rates results in reduction of revenues to the extent asserted by the bill, it neither shows confiscation, nor that the rates fixed are unreasonable, nor that the order is a direct interference with interstate commerce.

The alleged loss in revenue on interstate rates is but the indirect result of the proper exercise of a purely state power.

Such a loss is the same in principle as "would be a loss or expense resulting from a due exercise of the necessarily recognized police power residing in the state."

With reference to the intrastate business it is significant that although the state and interstate receipts are stated with care and detail, there is no allegation what the expenses of conducting state and interstate business may be. Tested by demurrer, the failure to make such a showing is to be construed most strongly against the pleader. "In other words, the pleader is not willing to negative the fact of reasonableness that attends the order by legal presumption." There is nothing in the bill to

show the value of the property for state uses and for interstate uses. Manifestly the carrier is not entitled to a return on the value of the property as a whole from state business and also a like return from interstate business. The property as a unit has one value, which in any consideration of the question of confiscation is to be divided equitably into the value of the property for the interstate use to which it is put, and the state use. No such allegation is made. *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 175. Not only is there nothing to show the cost of doing the state business, but there is nothing to show the amount of the business taking class rates affected by the order, or the actual or relative cost of doing that business.

On this subject at page 58 of the Record, the court below says:

"Again the complainant does not state the amount of intrastate traffic which will be affected by the order, nor the cost of service, nor the value of the property devoted to such business. It sets out the value of the entire property, the gross receipts and disbursements for both state and interstate business for a number of years prior to the date of the order, the amounts received from state and interstate business, freight and passenger, during the year 1909, and approximate percentage of tonnage affected by the order sought to be enjoined, assuming, as I take it, that both local and interstate traffic are affected by such order. There is no allegation as to the cost of conducting state business as distinguished from interstate business, and no statement of the difference between passenger and freight expenses."

Further, the alleged loss is only an estimate, not founded on any experience gained by putting the rates into effect. Nor is it certain, either as a matter of fact or of law, that the re-alignment of the appellants' rates on a proper and justifiable basis to avoid the discriminations between places and commodities found in the old tariff, will in any wise diminish the income received by the complainants. If there is any presumption which the law invokes on such a subject, and which common sense and all human experience would suggest, it is that the making of reasonable, relatively just rates in place of unreasonable and unjustly discriminatory rates would result in a greater prosperity for the communities served which would speedily reflect itself in the railroad's earnings. Carriers necessarily and justly participate in the prosperity of their patrons in the resultant enlargement of their own business. *Central Yellow Pine Assn. v. Illinois C. R. Co.*, 10 I. C. C. Rep. 505.

**ALLEGATIONS THAT RATE IS UNREASON-
ABLE AND IF ENFORCED WILL RESULT
IN LARGE LOSS OF REVENUE NOT
ADMITTED BY DEMURRER.**

Reagan v. Farmers' Loan & T. Co., 154 U. S. 401.

Central of Ga. R. Co. v. McLendon, 157 Fed. 961, 977.

Missouri Pacific R. Co. v. Smith, 60 Ark. 221, 5 Inters. Com. Rep. 348.

Southern Pacific Co. v. Interstate Commerce Commission, 177 Fed. 963.

"What is averred here as to the deprivation of property, and the future operations of the road at a loss, are mere conclusions as to supposed effects. *It does not amount to an allegation of facts.* It is the mere statement of a conclusion that the road would be operated at a loss because plaintiff would be compelled by the statute to enter into involuntary, unreasonable and unprofitable contracts. The allegation in question is, indeed, a conclusion based upon another conclusion as to the supposed operation of the statute."

B. C. R. & N. Ry Co. v. Dey, 82 Iowa, 312-343.

In the *Knoxville Water Company* case, *supra*, the court says it will not base its decision on speculation as to the effect of the rate, based on the operations of a prior fiscal year.

See also

Quimby v. Clyde S. S. Co., 12 I. C. C. Rep. 392, 396.

Brewer v. Louisville & N. R. Co., 7 I. C. C. Rep. 227, 238.

Central of Ga. R. Co. v. McLendon, 157 Fed. 961, 978.

THERE CAN BE BUT ONE TEST AS TO WHETHER RATES ARE CONFISCATORY —A REASONABLE, ACTUAL TRIAL.

In the absence of such a showing of actual test, the confiscatory nature of the rates must be shown beyond a reasonable doubt. Not only does it appear that there is no claim of anything except a *pro tanto* confiscation on an admittedly small proportion of the company's business, but the essential ele-

ments to show whether under the new rates the company will be carrying the traffic moving under the rates affected at a loss or profit are entirely wanting.

Ex parte Young, 209 U. S. 123.

Knoxville Water and Consolidated Gas cases,
supra.

**CONFISCATION CANNOT BE PREDICATED
OF A SINGLE RATE OR GROUP OF RATES,
BUT MUST BE JUDGED FROM THE EF-
FECT ON THE ENTIRE BUSINESS
DONE WITHIN THE STATE.**

The *pro tanto* confiscation theory has not received judicial approval. This is so, because such a theory would result in compelling a commission, before it could make or enforce an order, to determine accurately the exact cost of carrying each particular commodity and the exact return thereon, with the unsound implication that every rate must bear its fixed percentage of cost and pay a given profit.

The principle enunciated in the heading above has received the highest judicial approval.

Willcox v. Consol. Gas Co., 212 U. S. 19.

Atlantic Coast Line v. North Carolina Corp.
Comm., 206 U. S. 1.

Minneapolis & St. L. R. Co. v. Minnesota, 186
U. S. 257.

St. Louis & S. F. Ry. Co. v. Gill, 156 U. S.
649, 665.

Southern Railway Co. v. Atlanta Stove Co., 128
Ga. 207, 233, 234.

Wisconsin, etc., R. Co. v. Jacobson, 71 Minn. 519, s. c. 179 U. S. 287, 302.

State v. Missouri Pac. R. C., 76 Kans. 467.

Pensacola, etc., R. Co. v. Florida, 25 Fla. 310.

Morgan's R. R. Co. v. R. R. Comm., 109 La. 247.

People v. Railroad Co., 176 Ill. 512.

Chicago Union Traction Co. v. Chicago, 199 Ill. 579.

In deciding whether rates fixed under the legislative authority violate the fourteenth amendment, the Supreme Court does not rest its judgment on one set of rates for specific articles, but takes into consideration all the rates on all articles, and decides whether, as a whole, the result is unreasonable.

Smyth v. Ames, 171 U. S. 361.

In the case of the *Southern Ry. Co. v. Atlanta Stove Co.*, 128 Ga. 207, 233, 234, it was averred that the rates prescribed were unreasonable; that the amount earned in the transportation of the articles covered by the circular, between the points therein prescribed, would be less than the cost of service, and the effect of the enforcement of the rate would be to take property without due process of law, denying complainant the equal right and protection of the law, contrary to section 1, article XIV, of the amendments to the Constitution of the United States.

The court upheld the order of the commission, citing the case of *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 186 U. S. 257, and also *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, and said:

"The commission fixes a schedule of rates, some commodity rates which are higher than others, and necessarily so. The entire body of rates are prescribed with respect to their interrelation. The low rate is presumably fixed with reference to the higher rate, and conversely; and a particular rate cannot be said to be unreasonable without showing it to be such when taken in connection with the whole body of rates."

The Georgia court then held that the averment that the rates between the points therein prescribed would be less than the cost of service, did not raise an issue of fact,

"since conceding the truth of the averment for the reasons given above, the rate therein prescribed is not alleged to be unreasonable as a part of the whole body of rates prescribed by the commission."

Not only is the rule against the *pro tanto* theory, but the absence of a return in the schedule as a whole is not always to be taken as rendering the legislative act fixing rates unconstitutional. The reasonable worth of the service is the utmost the public can be expected to pay.

Reagan v. Farmers' L. & T. Co., 154 U. S. 412.

Symth v. Ames, 169 U. S. 466, 544, 547.

San Diego Land Co. v. National City, 174 U. S. 739.

Covington & Lex. Turnpike R. Co. v. Sandford, 164 U. S. 578, 596, 597.

Jerome Hill Cotton Co. v. M. K. & T. Ry. Co., 6 I. C. C. Rep. 601.

Southern Pac. Co. v. Bartine, 170 Fed. 725.

In *Noyes, Amer. R. R. Rates*, at page 25, the author says:

"But all this (the fair return on the value of the property devoted to the public use) has very little to do with particular charges. The value of the railroad property is only important in determining the reasonableness of an entire schedule of rates, an inquiry which can hardly arise except when a law-made tariff is attacked as being confiscatory and, therefore, unconstitutional. The value of the property is a most remote consideration in fixing an individual rate. While each shipment should undoubtedly produce its X-millionth part of the revenue required from all shipments, X is an unknowable quantity. It would be impossible to fix even the maximum of individual rates in any such way. In the long run the schedule should bring in a fair return upon capital invested, but the necessity for such return has practically no effect upon the charge for the particular service. We must look for other factors to determine the individual charge.

UNJUST DISCRIMINATION.

By the railroad commission act, the legislature has prohibited unjust discrimination, as against persons, localities, and particular descriptions of traffic, as it has also prohibited the imposition of unjust and unreasonable rates.

The reasonableness of a rate is one thing; whether it is unjustly discriminatory is another. Reasonable charges may constitute an unjust discrimination or create an unlawful preference. If rates are unjustly

discriminatory, they are forbidden by law, although in and of themselves they may be reasonable. Every deviation for equality, for which there is no specific warrant in law shown, is an unjust discrimination.

Beale & Wyman, R. R. Rate Regulation, Sec. 724, 839.

Portland R. L. & P. Co. v. Railroad Commission of Oregon, 105 Pac. 709, 715; 109 Pac. 273.

Interstate Com. Comm. v. Cinn., etc., Ry. Co., 167 U. S. 479, 511.

Kinnavey v. T. Ry. Assn., 81 Fed. 802, 804.

Board of Trade v. Ry. Co., 6 I. C. C. Rep. 632, 645.

In *Portland R. L. & P. Co. v. Railroad Comm. of Oregon*, 56 Or. 468, at page 484, the court said:

"It is not necessary, therefore, that the rate charged should be unreasonable, for if it is unjustly discriminatory, it is sufficient to authorize a regulation thereof."

In *Portland R. L. & P. Co. v. Railroad Comm. of Oregon*, 109 Pac., at page 274, the court said:

"But it was stated in immediate connection with that remark [i. e., that the rates condemned by the Commission were in fact not unreasonable as compared with charges of other railways] that the law authorizes an investigation upon a complaint as to a charge, which is in any respect 'unreasonable or unjustly discriminatory.' 'The fact that a rate is *per se* reasonable does not disprove the charge that it is unlawful,' say Messrs. Beale and Wyman in their work on *Railroad Regulation*, at section 839. 'If rates are relatively unjust, so that

undue preference is afforded to one locality or undue prejudice results to another, the law is violated and its penalties incurred, although the higher rate is not in itself excessive.' The question presented for consideration is not the reasonableness *per se* of the charge, but its reasonableness considered in relation to charges made by plaintiff at other localities on its system for like and contemporaneous service; for the statute, as we have construed it, forbids undue preference or discrimination between localities. Circumstances, however, may so explain the difference between rates compared as to deprive the lower rate of any bearing on the higher, but the discrimination, without an excuse recognized by the law, would be in and of itself unjust and unreasonable. Beale & Wyman, Sec. 838."

Citations might be multiplied indefinitely, but there is no question as to the law. The construction placed on the Oregon Commission act by the state Supreme Court in this regard is, of course, binding on this court.

There is nothing more abhorrent to a court of equity than an unjust discrimination. "Equality is equity." The effect of past discriminations, secret and open, has been intolerable; monopolies have been fostered, competition stifled, and communities dwarfed. The grosser forms of discrimination, such as open rebating, have been extirpated, but as said by the Interstate Commerce Commission (report for 1910), the fight against discriminations is not yet won. They still exist, often in forms so secret that they are known only by their results. The state

not only has the power, but it is its duty, as the fountain-head of justice and the guardian of the public interest, to use, if need be, the sternest measures to secure uniformity and equality of treatment of its citizens, individually and collectively, and of their products, by transportation companies exercising the high attributes of sovereignty itself.

FINDINGS OF COMMISSION.

In the case before the Commission, the following findings were made (Rec., p. 16), after setting out in paragraph 3 certain existing rates:

"4. That the above enumerated class rates are and each of them is unjust, unreasonable, and excessive. * * *

"5. That the aforesaid class rates are not arranged upon any uniform or approximately uniform relationship as to each other, and that in consequence thereof the aforesaid rates are unjustly discriminatory as against the several stations and localities above enumerated, and are unjustly discriminatory as between the various classes of commodities taking class rates according to the said Western Classification No. 48.

"6. That just and reasonable and non-discriminatory charges for said Southern Pacific Company to charge, collect, and impose in the future in lieu of those hereinafter [Note: error; original order says *hereinbefore*] found to be unjust and unreasonable, are the following" (Setting out new rates).

Then follows the order to cease and desist charging the rates set out in paragraph 3 and the mandate to substitute the rates set out in paragraph 6.

It will be seen the Commission (1) found the existing rates unjust and unreasonable, and (2) found the existing rates were unjustly discriminatory, and (3) found rates which were just and reasonable, and non-discriminatory. These latter rates are the ones which were ordered put in effect.

Either the finding of the unreasonableness of the existing rates, or their unjustly discriminatory character, was sufficient under the Oregon statute to support the order. It was not necessary that both facts should be found; either was itself a sufficient ground for condemnation of the existing rates and the substitution of other rates not subject to the same objection.

The whole bill of complaint is addressed to the question of the reasonableness of the rates and constitutional questions. There is not a word in it which either attacks the finding of the Commission as to the unjustly discriminatory character of the old rates, or seeks to explain or justify the wide divergences which appear on the face of the old tariff, and which themselves raise a presumption of unjust discrimination. So far as this bill is concerned, the findings of the Commission on that point are not only unchallenged by appellants, but the Commission's finding is shown to be right by an examination of the rates set out in paragraph 1 of the order itself. Everything contended by appellants in their bill could be conceded, and yet the Commission's order would be supported because it has the support of the law in condemnation of unjust

discriminations. Without an explanation of these obvious discriminations, and with the Commission's findings unchallenged, the bill is without equity.

DISCRIMINATION APPEARS ON THE FACE OF THE BILL.

In order that the court may see the basis of the finding of the Commission as to the discrimination found to exist in the tariffs complained of, we submit the following statement:

Section 20 of the act provides, "There shall be but one classification of freight in the state which shall be uniform on all railroads."

The purpose of this is to prevent undue discrimination and promote commerce and simplify tariffs. Under section 28, the Commission is given power to investigate classifications as well as other matters which may be complained of.

The court will probably take judicial notice of the fact of common knowledge that the freight classification known as the "Western Classification" is in force on all roads west of the Missouri river, including complainants. At any rate, from the order it appears the "Western Classification" is in effect in Oregon and from the tariffs has been adopted by the appellants. This classification was prepared by all the railroads interested, is revised frequently and represents their best judgment as to the different classes in which the various commodities belong. It divides all freight into ten classes, numbered 1 to 5 and lettered A to E; every commodity is located in one of these classes; in classifying

a commodity its character, value, weight, bulk, and many other things are considered in determining which class it takes, the first class includes those articles which should take the higher rate. The classification thus fixes the relation of one commodity to the other and the proportion of the total transportation revenue each should bear, and that is its purpose.

In order to prevent unjust discrimination after the commodities are thus classified a suitable relation of charges for the various classes one with the other must be maintained; otherwise the classification would serve no useful purpose. In the Pacific Northwest this is done by the use of the scale of percentages set out on page 46 (par. k) of the Record.

It is a matter of common knowledge that through the manipulation of the classification and improper spread between the classes much undue discrimination has been practiced. Hence the law provides there can be but one classification and commissions have established and enforced official scales definitely fixing the relationship of charges between the classes. The rates formerly in effect over the lines of the complainants furnish an excellent illustration of discrimination by reason of the maintenance of an excessively high relationship of the middle classes to first class, or to put it in another way, excessively high rates on the lower classes.

SCALE ADOPTED.

An examination of the rates in effect as shown by the Record (pp. 7 to 13) discloses appellants had established no fixed relation between the rates charged as between the different classes. It varied greatly every few miles, and for that no explanation is apparent or has been offered. Whether intentional or not, unjust discrimination inevitably resulted from operation of the tariff, as will hereafter be shown.

The bill alleged (par. XV, p. 46, Record) that the order is void because it is based on an arbitrary approval of the first class rates and the fixing of an arbitrary spread between the classes as follows:

Class	1	2	3	4	5	A	B	C	D	E
Per cent	100	85	70	60	50	50	40	30	25	20

In other words, instead of the fourth class rate being from 50 to 78 per cent of the first class rate as heretofore charged by appellants it is fixed on a basis of 60 per cent thereof.

It is alleged the scale was adopted arbitrarily, without reference to the distance the traffic moves, the character or nature of the traffic, the service performed, or the compensation to be paid therefor, and the classification is capricious and not based upon any fair consideration, that under the spread fixed the largest reduction is effective at points on the line most difficult and expensive to operate.

Here again is an allegation the pertinency of which it is difficult to see. As to the spread between the classes being arbitrary and capricious it

might be suggested it is the official scale, and as shown by the tariffs on file, the one generally adopted and used by all the railroads in this section.

Some such argument was presented to the court consisting of Judges Gilbert, Ross and Morrow in the case of *Southern Pacific Co. v. Interstate Commerce Commission*, No. 15250, in the Circuit Court of the United States, ninth judicial circuit, northern district of California. The answer of the court in opinion filed but not reported was as follows:

"It is said again that the rates were fixed arbitrarily, that there was a general readjustment of rates, a comprehensive and radical change of rates. Every establishment of a rate must be in a sense arbitrary; but if it is arbitrary in the sense that it is violative of the law, or disregards the equities of the parties or is an abuse of discretion, those are grounds for setting it aside. But there are no such grounds presented in these bills. * * *

And again:

"the mere fact that the readjustment is comprehensive and radical is no ground for setting it aside; the situation may have called for a comprehensive reduction. * * *

And again:

"taking the bills as they are, they fail to make a case which would justify this court in substituting its judgment if it had a different judgment, from that of the Interstate Commerce Commission and enjoining even temporarily the rates which they have established."

THE OREGON SCALE GENERALLY IN USE IN THE NORTHWEST.

No argument is necessary to show how a first class rate might be entirely reasonable and by the manipulation of the scale the commodities moving under the lower classes taxed excessive and unjustly discriminatory rates. To guard against this is the purpose of the classification and the scale or relationship of the rates, and the failure to observe these necessary purposes is a vice of the tariff under review.

We assume we have the right to refer to the public records of the state of Washington as to the official scale adopted in that state by order of the Railroad Commission of Washington, September 13, 1906. Under this order the relation which each class should bear to the other, was fixed on exactly the same scale as that fixed in this case by the Oregon Commission, and has never been changed.

As indicating the universality of the use of the scale adopted in this section and its approval by the Interstate Commerce Commission, we refer to certain decisions made by them covering movements under class rates west of the Rocky Mountains and the Missouri river.

In the cases of *Portland Chamber of Commerce v. Oregon R. & N. Co. et al.*, *Transportation Bureau of Seattle Chamber of Commerce et al. v. N. P. Ry. Co. et al.*, 21 I. C. C. Rep. 640, involving movement of traffic under class rates out of Portland, Seattle and Tacoma in Oregon, Washington, Montana, Idaho and Utah over roads terminating in said

cities, the commission found a reduction justified and named reasonable rates. The relation between the class is precisely the same scale which was employed in the case at bar.

In the case of *City of Spokane et al. v. Northern Pacific Railway Co. et al.*, 15 I. C. C. Rep. 376, the Interstate Commerce Commission established reasonable class rates from St. Paul to Spokane. The relationship between the rates varies but slightly from the Oregon and Washington official scale.

In *Traffic Bureau of The Merchants Exchange v. Southern Pacific Company*, 19 I. C. C. Rep. 259, class rates from Sacramento to points in Nevada involving the crossing of the Sierra Nevada mountains were under review.

Here again the relationship between the classes is substantially the same as fixed by the Oregon Commission.

In the case of *Commercial Club of Salt Lake v. A. T. & S. F. Ry. Co.*, 19 I. C. C. Rep. 218, rates were prescribed by the Interstate Commerce Commission to Salt Lake from Omaha upon substantially the following scale:

Class	1	2	3	4	5	A	B	C	D	E
Per cent of 1st class prescribed	100	86	72	59	49	49	39	35	25½	21½
Oregon-Washington official scale	100	85	70	60	50	50	40	30	25	20

Indeed, an examination of any of the distance or class rate tariffs used in Oregon or Washington except that of appellants will show instantly the action of the Commission could not possibly be characterized as arbitrary. On the contrary one

must conclude that the burden was on appellants to justify the abnormal and varying scale in use by them. No such explanation or justification was offered.

RELATIONSHIPS CONDEMNED AS CREATING DISCRIMINATIONS.

Perhaps the best way to show the effect of the relationship condemned is to submit a table of representative points and the percentage relationship of the rates between the various points as shown by the rates condemned (Rec., 7 to 15).

Scale of rates as fixed by Railroad Commission, known as official scale, compared with scales as shown at a number of representative points on Southern Pacific lines in Oregon:

Less Carload Classes	1	2	3	4
Official Scale	100%	85%	70%	60%
Miles between Portland and				
34 Canby	100	83.3	66.7	50
53 Salem	100	87.5	75	66.7
80 Albany	100	89.3	78.6	71.4
123 Eugene	100	91.3	84.8	78.2
198 Roseburg	100	88.9	82	76.4
249 West Fork	100	87.8	80	75.6
297 Grants Pass	100	86.9	80.4	74.8
342 Ashland	100	87	80.4	74
86 Lowson	100	90.6	81.2	78.1
100 Twin Buttes	100	92.5	82.5	75

Carload Classes	5	A	B	C	D	E
Official Scale	50%	50%	40%	30%	25%	20%
Miles between Portland and						
34 Canby	44.4	44.4	44.4	33.3	27.8	22.3
53 Salem	58.4	58.4	50	37.5	29.3	25
80 Albany	64.3	60.7	60.7	46.4	39.3	35.7
123 Eugene	71.7	67.4	64.4	43.5	32.6	26.1
198 Roseburg	69.4	62.5	50	34.7	25	20.8
249 West Fork	67.8	62.2	48.9	31.1	23.2	20
297 Grants Pass	67.3	60.7	47.7	29	21.5	18.7
342 Ashland	66.6	60.2	47.2	27.6	20.2	17.8
86 Lowson	71.8	71.6	59.4	50	34.4	31.2
100 Twin Buttes	70	67.5	52.5	45	32.5	25.5

The irregularity of the scale is apparent and after reaching Eugene the extremely high percentage the third, fourth and fifth classes bear to the first class as compared with the official scale is equally apparent.

ARBITRARINESS OF THE ORDER.

This has been referred to under the caption "Scale Adopted." This allegation is set out in paragraph XV (k) of the bill (p. 46, Rec.) and is as follows:

"And your orators allege and show the said order of the said Railroad Commission of Oregon is void and of no force and effect in this: * * *

(k) "Said order is void and of no force and effect in this: That the pretended reduction of said class rates is based upon the arbitrary approval of Class 1 now in effect by your orator Southern Pacific Company, and an arbitrary spread between said class rates, adopting the arbitraries of 10 per cent for first class, 85 per cent of first class for second class, [here follow other percentages of official scale] * * * which said arbitrary classification and spread, and each thereof, was adopted by the said Railroad Commission in making said pretended order, and was so adopted arbitrarily and without any reference to the distance such traffic should be moved, or the character or nature of the traffic, or the service to be performed, or the compensation that should be paid therefor, and said classification is capricious and not based upon any fair consideration.

"And your orators further show that under said arbitrary spread, or the application of said percentage to said class rates, the largest reduction is effective at points on said lines more difficult and expensive to operate by reason of mountain chains and physical difficulties."

This is a mere statement of a conclusion of law and not of fact. There is nothing to show that the relationship between the various classes *established by the Southern Pacific Company itself* was made with reference to the distance the traffic should be moved, and the character and nature of the traffic and the service performed, and the considerations upon which the same is based; and the averment that the largest reduction is made at points where the line is most expensive to operate by reason of mountain chains and physical difficulties is entirely irrelevant. The allegation is not sufficient to overcome the presumption that the adoption of the uniform percentage scale was not arbitrary, but on the contrary was reasonable.

Moreover, the allegation that the Commission adopted the scale without regard to distance, value of service or with respect to the character of the country is refuted by the bill.

The bill alleges the Commission made no substantial change in the first class rate. This is true. Therefore if the first class rate already in effect was made with these considerations in mind (and there is no allegation to the contrary), it is not subject to complaint. From the bill it appears both

by direct allegation and the order which is set out in full, the Commission found by applying the official scale reasonable and non-discriminatory rates would result.

It necessarily follows, therefore, that every factor counsel contends was not considered, must have been considered, as mathematically it could not be otherwise.

Distance was considered, as shown by the tables set out in the complaint.

As illustrative, take the fourth class rate as fixed by the order.

Distance from

<i>Portland.</i>	<i>Station.</i>	<i>Rate in Cents.</i>
123 miles	Eugene	28
198 miles	Roseburg	43
263 miles	Glendale	57
297 miles	Grants Pass	64
329 miles	Medford	71
342 miles	Ashland	74

The rate gradually advances with the distance.

The classification was unchanged. The very basis on which the classification is prepared takes into account the character, nature and value of the traffic. It stands as adopted and in use by appellants. Therefore when it is alleged the character or nature of the traffic was not considered, on its face the allegation is not the fact.

Appellants state without explanation the largest reductions are made to points on the line most difficult to operate. Whether this refers to the spread or to the rate cannot be determined. In either event

the allegation is baseless unless it may happen that at some point which counsel has in mind appellants may have maintained some particularly high rate, in which event it would be the duty of the Commission to make the greatest reduction at such point. The rates established as shown by the bill gradually increase with the distance and use appellants' own first class rate and classification as a base—and the same scale is used throughout.

There was a similar allegation in the bill of *O. R. & N. Co. v. Campbell*, 173 Fed. 957, 991, decided by the Circuit Court below. There the allegation was:

"It is a fact that such attempted adjustment, (i. e., giving branch line points the same relative rates as main line points, on the scale adopted in the case at bar) is arbitrary and unreasonable, and is founded upon no circumstance and condition affecting the cost of service to your orator or the value of the service to the public, and is unjust to your orator."

This, the Circuit Court said, was merely argumentative.

"But the fault of the bill is that no facts are stated as to the cost of service, or in any way indicating what it is worth to transport freight over the lines of the complainant between the points designated, and the court is, therefore, unable to say from the bill that the rate fixed by the Commission is unreasonably low. Especially are these and similar averments insufficient, when read in view of the particular theory upon which the suit is instituted."

The court will take judicial knowledge of the fact that Eugene is in the Willamette valley, a very level, one might say, flat country; that Roseburg is in a more mountainous section and to reach Grants Pass grades are quite heavy and the country more mountainous than the Roseburg section. Yet to Eugene the appellants' tariffs condemned by the order named a second class rate which was 91 per cent of the first, the third 85 per cent, the fourth 78 per cent, the fifth 71 per cent. At Roseburg the relationship on the same classes was 89 per cent, 82 per cent, 76 per cent, 69 per cent. At Grants Pass, 87 per cent, 80 per cent, 75 per cent, 67 per cent. The bill itself proves conclusively the rates on the second to fifth classes were relatively lower after leaving Eugene going south, than they are at Eugene and negatives beyond question the allegation under consideration. As the first class rate is substantially unchanged throughout, it is apparent the scale fixed by the Commission which operates regularly throughout results in fairer rates to appellants than the rate formerly in effect.

Beyond question the unjust discrimination as found by the Commission existed. It appears on the face of the bill. It cannot be denied or explained, and a consideration of the allegation attempting to create this issue but emphasizes the fact.

COMMODITIES PRINCIPALLY AFFECTED.

Appellants allege in substance that the greatest decrease in the rates affects classes 4 and 5; that under these classes staples, and particularly groceries and hardware move; that the decrease will largely benefit jobbers and dealers "in said commodities" who "during several years last past have made and are now making large and excessive profits under said class rates and that the pretended order if put into effect will still further increase the profits of said dealers and jobbers at the expense of your orators and of the public at large." (Par. 10, p. 37 Rec.)

What possible weight can be attached to such allegations as these? Admit them all as facts, and they do not tend to show the rates fixed by the Commission are unreasonable or confiscatory, or that the former rates were not unjust and discriminatory. Taken in connection with other allegations and legal presumptions, the allegations condemn the bill instead of supporting it.

They allege there is a large movement of staples such as groceries and hardware under classes 4 and 5. An examination of the tariff set out in the complaint shows that the difference heretofore existing between these classes and first class, where the character of commodities moving under first class rates is considered, was not very great. In other words from Eugene to Ashland the fourth class rate was from 74 to 78 per cent of the first class rate. Even if tariffs on file in this cause

did not show the fact, or if the court could not take judicial notice of the official scale in the Pacific Northwest, one's own general knowledge would lead to the conclusion that such a percentage of the first class rate for carrying staple and heavy commodities like groceries and hardware as compared with high grade and much lighter goods such as clothing, dry goods, etc., taking first class rates would be very high and unjustly discriminatory. We say this would be the presumption—and this presumption is entirely justified by the tariffs of appellants.

This allegation, therefore, taken in connection with other parts of the complaint, instead of being an argument against the validity of the order, tends to show that complainants have been charging extortionate and discriminatory rates on these heavy staple goods of common use—because they could.

It is difficult to see the purpose of the allegations respecting the profits jobbers and dealers in groceries and hardware are alleged to have been making. If this allegation requires any answer we submit:

1. The dealers and jobbers do not pay the freight, *but the consumer does.*

2. The test of the reasonableness of a rate is not the amount of profit in the business of a shipper, but whether the rate yields a reasonable compensation for the service rendered.

Smyth v. Ames, 169 U. S. 466.

C. & N. W. R. R. Co. v. Osborne, 52 Fed. 914.

Tift v. Southern Ry. Co., 138 Fed. 753, s. c., 10 I. C. C. Rep. 54.

Cent. Yel. Pine Assn. v. Ill. Cent. R. R. Co., 10 I. C. C. Rep. 505.

PRESUMPTION THE RATES WERE NOT FIXED ARBITRARILY.

Section 31 of the act provides:

"All rates, fares, classifications and joint rates fixed by the Commission shall be in force and shall be *prima facie* lawful, and all regulations, practices and services prescribed by the Commission shall be in force and shall be *prima facie* reasonable until finally found otherwise in an action brought for that purpose pursuant to the provisions of sections 32, 33, 34 and 35 of this act."

Under a clause substantially similar to this, in the case of *Atlantic Coast Line v. Florida*, 203 U. S. 256, the Supreme Court upheld a similar provision of the law, and in discussing the question, said: "We start, therefore, with the presumption in favor of the order." See also

Steenerson v. Great Northern R. Co., 69 Minn. 353.

Interstate Com. Comm. v. Louisville & N. R. Co., 118 Fed. 616.

Same v. Same, 102 Fed. 709.

The averments of the bill cannot override the formal decision of the Commission on a question of fact. The decision of the Commission is entitled to respect and consideration, and, to say the least, its

findings and decisions on questions of fact should be treated as *prima facie* correct.

Cumberland, etc., Co. v. Railroad Commission,
156 Fed. 834, 837.

In the same case on appeal, the court examined the proofs which were before the commission, and upon which the order fixing rates had been made. The court said:

"Now it may be true that all these returns did not contain all the data upon which a very close and accurate judgment could be based as to the rates that ought to be charged by complainant, under all the circumstances. This is only saying the order may have been erroneous or based upon insufficient evidence, which is no more than saying that, upon investigation, the commission may have come to a mistaken conclusion by reason of erroneous inferences from the evidence furnished by complainant's own returns; but that is far from showing that the commission had, by a merely arbitrary order, promulgated certain rates without making the slightest effort to obtain any knowledge whatever upon the subject. It did not lose jurisdiction by reason of the mistakes it may have made, and, as a result, the rates adopted were not merely arbitrary conjectures, but based on reasons which, while they may have been insufficient, cannot be described as resulting in a decision wholly without evidence to support it. The rates, therefore, promulgated, must be regarded as *prima facie* fair and valid, or, in other words, the *onus* was upon complainant to show that they were what it asserts, confiscatory or unreasonable."

Railroad Commission v. Cumberland, etc., Co.,
212 U. S. 414, 422.

In *Southern Pacific Co. v. Interstate Commerce Commission* (No. 15250), in the Northern District of California, before Judges Gilbert, Ross and Morrow, on November 23, 1910, in opinion filed but not reported, the court said:

"This case comes here from the decision of the Interstate Commerce Commission. It is not denied that the Commission had jurisdiction and that it heard the case; that there was a hearing. The presumption must be that that hearing covered all questions that were involved and that the conclusion of the Commission must be sustained as reasonable."

It appears from the bill herein that the relationships between the various classes, as fixed by the Southern Pacific Company prior to the order, were widely divergent at various stations, even at nearby stations upon the same line, or parallel lines. In the absence of explanation (*which is not given*), it must be taken that the schedule of rates exacted when the order was made was itself arbitrary and capricious, and if there are any circumstances or conditions which warrant deviation from the statutory rule for one uniform classification of freight, the appellants do not now offer them. On the contrary, appellants are in court complaining (par. XV-(k) of bill, Rec. 46) because the Commission prescribed rates which were based on an uniform scale.

Appellants ask the court to take judicial notice of certain tariffs which have been filed with the Interstate Commerce Commission and which are

by reference made part of the bill, on the theory that tariffs filed with that body become part of the law of the land. If this court can take judicial notice of tariffs filed with the Interstate Commerce Commission, then the court may take judicial notice of the fact that the local class rates out of Seattle, Tacoma, and Portland on the Great Northern, Northern Pacific and O.-W. R. & N. Co. are all constructed on the same scale of percentage relations as that which the complainants now say is arbitrary and capricious and not founded on any circumstances or consideration of traffic conditions. The court must also judicially notice that the distance tariffs of the three lines mentioned, and also the Chicago Milwaukee & Puget Sound, applicable in the Pacific Northwest, are all based on the same percentage scale as that characterized by complainants as arbitrary. The court must also notice that the Oregon Short Line Railroad distributive and distance tariffs are with a trifling exception the same as that prescribed by the Oregon Commission, and that the Interstate Commerce Commission in the cases heretofore referred to has adopted precisely the same scale.

With these facts before the court, and it appearing that there was a hearing before the Commission to which no other exception is taken, with appellants' own tariffs showing inexplicable discrepancies and inequalities, how can it be maintained by such averments that the action of the Commission in prescribing an uniform scale of rates is so arbitrary and capricious as to shock the conscience of the chancellor?

Arbitrariness of action on the part of a commission is not ground for judicial interference with its action, when such action does not appear to be arbitrary except in the sense in which many honest and sensible judgments are so. "They express an intuition of experience which outruns analysis and sum up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth. The (tax commission) board was created for the purpose of using its judgment and its knowledge. (Citing *Railroad Tax* cases, 92 U. S. 575; *State v. Savage*, 65 Neb. 714, 768, 769; *In re Cruger*, 84 N. Y. 619, 621; *San Jose Gas Co. v. January*, 57 Cal. 614, 616). Within its jurisdiction, except as we have said, in case of fraud or clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The state has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end."

Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 598.

If the Commission exercises an honest discretion, however wrong its decision from the standpoint of truth in the abstract, in the eye of the law it is the indisputable right in the matter, subject only to jurisdictional defects.

State v. Houser, 122 Wis. 534, 570.

RETURN FROM THE WHOLE LINE MUST BE CONSIDERED.

Another principle is overlooked by the pleader. It is the return from the whole line, and not from particular portions of the line which governs.

"The cost of constructing and maintaining a portion of a railway, and the volume of business on one part of the line when compared with another, may make the operation of one section much more remunerative than another, but the net revenue upon which dividends are declared is not based on particular divisions of the road, but upon the entire system."

Portland Ry. L. & P. Co. v. Railroad Commission of Oregon, 56 Or. 468, 482.

The fact that one branch or part of a railroad system fails to pay its expenses does not justify the imposition of unjust or unreasonable rates, or undue discrimination.

Interstate Commerce Comm. v. Louisville & N. R. Co., 118 Fed. 613, syll. 3.

As was said by the Interstate Commerce Commission in the case of *Traffic Bureau of Merchants Exchange v. S. P. Co.*, 19 I. C. C. Rep., at page 261:

"We do not recognize the right of a carrier to single out a piece of expensive road and make the local traffic thereon bear an undue portion of the expense of its maintenance or of its construction. A road is built and operated as a whole," etc.

And again:

"If the position of the defendant were followed by the carriers generally (which it is not, not even by itself), it would result in rates that would vary from mile to mile as the cost of the road varies."

The correct test is the effect of the rates upon the entire line, and not upon constituent parts. The company cannot claim the right to earn a net profit from every mile, section, or other part into which the road may be divided, nor attack as unjust a regulation which fixed a rate which at some such part would be unremunerative. It would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated. Indeed, no railroad pretends to or could make rates on such a basis and no such allegation appears in the bill. To the extent that the question of injustice is to be determined by the effects of the order upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act or order within the state.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 665, 666.

The briefest inspection of the rates formerly in effect as set out in the complaint, show that the complainants gradually advanced their rates with the distance, the *highest rates, relatively, not being* as suggested by them *in difficult and expensive sections but in the least difficult and expensive portion.*

EFFECT OF FINDINGS OF COMMISSION AS TO DISCRIMINATION.

Does the allegation under discussion tender any issue? Will a court in such a case set up its judgment as to what constitutes a fair relationship of rates as against a commission specially created to pass on such questions? The Oregon Commission, in the exercise of its own jurisdiction, is the same kind of tribunal whose findings in *Ill. C. R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, the Supreme Court said were "the judgments of a tribunal appointed by law and informed by experience." Will a court say a scale adopted officially and in general use throughout an entire section is arbitrary, capricious, and unlawful?

This court has spoken in no uncertain tone as to the effect of the findings of the Interstate Commerce Commission on discrimination, and the powers of that commission over interstate commerce are no greater than are those of the state commission over intrastate commerce.

Findings of fact made by the Interstate Commerce Commission as to preferences and discriminations in railway rates are beyond the competency of the courts to re-examine.

Interstate Com. Comm. v. Delaware L. & W. R. Co., 220 U. S. 235.

B. & O. R. Co. v. United States, 215 U. S. 481.

OBJECT OF SUIT.

It is manifest from the bill of appellants, its meagerness of fact, the general character of its

allegations as to the unreasonableness of the order, that the effect on the revenue of the appellants is not the moving cause of this suit. Its real purpose is:

First. To eliminate the power of the state directly or through an administrative body to fix rates or control or regulate railroads within the state.

Second. To make the state Railroad Commission a "useless piece of machinery," to eliminate its power to enforce any order it may make, so that its actions would be merely advisory, and to permit the carrier as a matter of right, to have a court pass upon the mere reasonableness of rates before the order becomes effective. This would make the courts, instead of the commission, the administrative body to carry into effect the legislative will. This is neither legally possible nor economically practicable.

It is now well settled on principle and authority:

1. Congress has power to regulate and control interstate commerce and as to that commerce its authority is supreme.

2. The state has power to regulate and control intrastate commerce and as to that its authority is supreme.

3. The interference by the state with interstate commerce to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of the state.

4. When the carrier uses a local intrastate rate as a factor in making a through interstate rate it does so knowing that all such local rates are under

the control of the state and subject to its regulation. The fact that a reduction of local rates by the state may incidentally place the company under the business necessity of changing its manner of stating its rates or of reducing its interstate rates does not affect the legality of such reduction.

5. Congress has no control over the state commerce which the order seeks to regulate. If the state cannot control it we have a condition whereby a very large portion of the commerce of the United States will be under no control and beyond restraint and the states deprived of a power inherent in every sovereignty.

6. A judicial inquiry is limited to ascertaining whether or not a rate is confiscatory, not whether it is reasonable in the ordinary meaning of the word.

7. Confiscation cannot be predicated of a particular rate or group of rates. It must be shown that the entire body of rates within a state are so unjustly low as to deprive the carrier of reward, and amount to taking of the property.

8. If rates are so unreasonably low as to amount to confiscation the court may enjoin the operation of the order fixing such rates. The burden is upon the carrier to make this appear clearly and beyond doubt.

9. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of the public highway

than the services rendered by it are reasonably worth.

10. The public interest is paramount and a carrier is not entitled to any given per cent on its investment, nor to any profit, if in order to secure them excessive or unjustly discriminatory rates are necessary.

11. The ascertainment of what particular rates under all the circumstances are just and reasonable and non-discriminatory as between the carrier, the shipper and the public is a legislative, not a judicial, function.

12. Where a rate is attacked, general allegations of unreasonableness or confiscation state no cause of suit. Facts must be alleged from which the court can arrive at an independent conclusion.

13. The order affects and is intended to affect intrastate rates only. What is state commerce has been clearly defined by this court. Any other class of traffic cannot be affected. This court will not indulge in the presumption that the state of Oregon will interfere or attempt to interfere with interstate commerce. The only difficulty even under appellants' contention arises from its own conduct.

14. The interference alleged is the result of the voluntary use of local rates as such in arriving at the total of through rates. This could be easily remedied without an appeal to the chancellor, without injunctions or appeals to courts at all.

15. The order must be supported if weight is to

be given the uncontroverted findings of the Commission as to unjust discrimination.

Conscious of the great principles involved and solicitous of the welfare of the commonwealth, we have been led to a discussion of the law and the facts perhaps unduly prolonged. The question is momentous. It involves the overturning of an unbroken line of authorities extending from *Gibbons v. Ogden* to *Howard v. Illinois Central*. Is "that commerce which is completely internal, which is carried on between man and man in a state or between different parts of the same state, and which does not extend to or affect other states," to be taken out of the sovereign control of that state and be left subject to no control? Is there to be an attempt to "extend the power of Congress to every conceivable subject, however inherently local," and to "obliterate all the limitations of power imposed by the Constitution, and destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures?" The attack on state control of its own business has been persistent and insidious; it does not result from a patriotic desire to strengthen the hands of the central government nor from motives of economic altruism. The bald fact is, that what is hoped for in these cases is the nullification of all regulation over traffic which is purely intrastate.

The case at bar is a striking example of the extremes to which the doctrine would necessarily be carried.

Before so revolutionary a step is taken, all—court, counsel and parties—may well recall the principles which have so far guided the nation and the states in their dual relations, and contemplate the consequences of the doctrine invoked.

CONCLUSION.

On behalf of the state we unhesitatingly say that, did we not feel the bill of complaint states no facts constituting a cause of suit and that the issues properly presented are of law only, we would have answered the bill as it stands and without delay. The state has nothing to gain by any course except that of entire fairness and frankness. The Railroad Commission of Oregon has no desire to misuse its great powers or to treat unfairly in any respect any citizen, individual or corporate.

After due investigation and hearing it announced its conclusions, and the bill of complaint states no facts in our opinion which would justify the court in setting aside the order complained of.

It is respectfully submitted the judgment and decree of the court below should be affirmed.

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SOUTHERN PACIFIC COMPANY AND OREGON &
CALIFORNIA RAILROAD COMPANY v. CAMP-
BELL ET AL., CONSTITUTING THE RAILROAD
COMMISSION OF OREGON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON.

No. 428. Argued April 9, 1912.—Decided June 16, 1913.

The enforcement of an order of the State Railroad Commission prescribing rates of intrastate transportation will not be restrained at the instance of a carrier on the ground that the rates are confiscatory where the allegations of the bill are insufficient to show that the carrier would be deprived of just compensation in the business of intrastate transportation by virtue of the operation of the order.

A general charter provision, giving power to charge and collect tolls, necessarily implies that the charges shall be reasonable, and does not detract from the power of the State to prescribe reasonable rates.

The court should only override the decision of the body which has been given legislative authority to establish rates of transportation where the action of such body is of such an arbitrary character as to constitute an abuse of powers.

This court follows the decision of the state court as to the constitutionality of a state statute conferring power on a Railroad Commission to establish intrastate rates.

Penal provisions of a state statute regulating railroad rates which are separable furnish no ground for the courts denying effect to the rates if the statute is otherwise valid.

189 Fed. Rep. 182, affirmed.

THE facts, which involve the constitutionality of an order of the Railroad Commission of Oregon of September 21, 1910, prescribing railroad freight rates, are stated in the opinion.

Mr. Maxwell Everts for appellants submitted.

Mr. Joseph N. Teal, with whom *Mr. A. M. Crawford*,

Attorney General of Oregon, and Mr. Clyde B. Aitchison were on the brief, for appellees:

The constitutionality of the Railroad Commission Act having been sustained by the Supreme Court of Oregon, *State v. Corvallis R. R. Co.*, 117 Pac. Rep. 980, that construction is binding upon this court. *Mo. Pac. Ry. Co. v. Taylor*, 216 U. S. 262; *Jack v. Kansas*, 199 U. S. 372, 379; *Smiley v. Kansas*, 196 U. S. 447; *Merchants' Bank v. Pennsylvania*, 167 U. S. 461.

The Supreme Court of Oregon has sustained orders of the present Railroad Commission in *Portland Ry. Co. v. Railroad Comm.*, 57 Oregon, 126; 56 Oregon, 468; *Martin v. Oregon R. & N. Co.*, 58 Oregon, 198; *So. Pac. Co. v. Railroad Comm.*, 119 Pac. Rep. 727.

The constitutionality of the Oregon act has been also sustained in the Circuit Court of the United States. *Oregon Nav. Co. v. Campbell*, 173 Fed. Rep. 957; *So. Pac. Co. v. Campbell*, 189 Fed. Rep. 182.

The severity of the penalty is a matter for legislative and not for judicial discretion. *Southern Exp. Co. v. Commonwealth*, 92 Virginia, 59; 168 U. S. 705; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339; *Burlington, C. R. & N. Co. v. Dey*, 82 Iowa, 312, 341.

Section 32 of the act, conferring jurisdiction of suits against the commission on the state circuit court for Marion county, is not unconstitutional. *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *Oregon Railroad & Navigation Co. v. Campbell*, 173 Fed. Rep. 957.

When the legislature adopts general rules and delegates power to a commission to apply them to specific facts and to exercise its discretion in respect thereto, the ultimate act is legislative. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Prentiss v. Atlantic Coast Line R. Co.*, 211 U. S. 210; *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282; *Atlantic Coast Line Ry. Co. v. North Carolina*, 206 U. S. 1; *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*,

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204 U. S. 426; *Texas & Pac. Ry. Co. v. Mugg*, 202 U. S. 242; *Texas & Pac. Ry. Co. v. Cisco Oil Co.*, 204 U. S. 449.

"Unreasonable" as used by courts in passing on reasonableness of rates fixed by legislative authority means confiscatory. *Spring Valley Water Works v. San Francisco*, 82 California, 286; *Chicago & Grand Trunk Railway Co. v. Wellman*, 143 U. S. 339, 344; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 399; *Smyth v. Ames*, 169 U. S. 466; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 614, 615; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 754; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439; *Covington &c. Turnpike Co. v. Sandford*, 164 U. S. 578; *Stanislaus County v. San Joaquin Co.*, 192 U. S. 201; *Willcox v. Cons. Gas Co.*, 212 U. S. 19; *Ex parte Young*, 209 U. S. 123.

The power of the judiciary to control the legislature extends only to declaring legislation unconstitutional, when it conflicts with Federal or state constitutions. Cooley, *Constitutional Limitations* (7th ed.), 326, 241, 257; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 295; *Int. Comm. Comm. v. Illinois Central R. Co.*, 215 U. S. 452, 470.

The commission's order is presumptively lawful. *Munn v. Illinois*, 94 U. S. 113; *Ruggles v. Illinois*, 108 U. S. 536, 541; *Sweet v. Rechel*, 159 U. S. 380, 392; *Chicago &c. R. Co. v. Wellman*, 143 U. S. 339, 344; *San Diego &c. Co. v. National City*, 174 U. S. 739, 754; *Chicago &c. R. Co. v. Tompkins*, 176 U. S. 167, 173; *Louisville &c. R. Co. v. Kentucky*, 183 U. S. 503, 511; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1. 8; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41.

There is no standard by which the reasonableness of a rate can be tested purely as matter of law. *Illinois Central R. Co. v. Int. Comm. Comm.*, 206 U. S. 441; *Texas & Pac. R. Co. v. Int. Comm. Comm.*, 162 U. S. 197; *Cincinnati, N. O. & T. P. R. Co. v. Int. Comm. Comm.*, 162 U. S. 184.

The commission is an expert body. *Smyth v. Ames*, 169 U. S. 466, 527; *Southern Pacific Co. v. Railroad Comm. of Oregon*, 119 Pac. Rep. 927; *Or., East Tenn., V. & G. R. Co. v. Int. Comm. Comm.*, 99 Fed. Rep. 52, 64; *Steenerson v. Great Northern R. Co.*, 69 Minnesota, 353, 377; Noyes, *Amer. Railroad Rates*, p. 206; 2 Redfield, *Railways* (6th ed.), p. 606; *Railroad Comm. v. Cent. of Ga. Ry. Co.*, 170 Fed. Rep. 225; *Minneapolis &c. R. Co. v. Railroad Comm.*, 136 Wisconsin, 146.

Determinations of fact by the commission upon the reasonableness of a rate are conclusive and may not be reëxamined by the courts. *Int. Comm. Comm. v. Illinois Central R. Co.*, 215 U. S. 452; *Int. Comm. Comm. v. Chicago, R. I. & P. R. Co.*, 218 U. S. 88, 110; *So. Pac. Co. v. Int. Comm. Comm.*, 219 U. S. 433, 442; *Int. Comm. Comm. v. Delaware, L. & W. R. Co.*, 220 U. S. 235; *Baltimore & O. R. Co. v. United States ex rel. Pitcairn*, 215 U. S. 481; *Monongahela Bridge Co. v. United States*, 216 U. S. 177; *Illinois Central R. Co. v. Int. Comm. Comm.*, 206 U. S. 441, 454; *Cincinnati, H. & D. R. Co. v. Int. Comm. Comm.*, 206 U. S. 142, 154; *Cincinnati, N. O. & T. P. R. Co. v. Int. Comm. Comm.*, 162 U. S. 184; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648.

State courts have construed the powers of state commissions similarly. *Steenerson v. Great Northern Ry. Co.*, 69 Minnesota, 353, 375, 376; *State v. C., M. & St. P. Ry. Co.*, 38 Minnesota, 281, 298; *Foreman v. Board*, 64 Minnesota, 371; *State v. Young*, 29 Minnesota, 474; *Reagan v. Farmers' &c. Co.*, 154 U. S. 362; *So. Pac. Co. v. Railroad Comm. of Oregon*, 119 Pac. Rep. (Or.) 727; *Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Comm.*, 136 Wisconsin, 146; *Chicago, Rock Island & P. R. Co. v. Railway Comm.*, 85 Nebraska, 818, 824-5; *Spring Valley Water Works v. San Francisco*, 82 California, 286, 306; *Jacobson v. Wisconsin Ry. Co.*, 71 Minnesota, 519, 529; 179 U. S. 287; *Morgan's &c. R. Co. v. Railroad Comm. of Louisiana*, 109 Louisiana,

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247, 265; *In re Amsterdam*, 33 N. Y. Supp. 1009; *People v. Board of R. R. Comm.*, 53 App. Div. (N. Y.) 61; *Pensacola &c. R. Co. v. State*, 25 Florida, 310; *Storrs v. Pensacola Ry. Co.*, 29 Florida, 617; *State ex rel. R. R. Comm. v. Seaboard Air Line R. Co.*, 48 Florida, 129.

Courts will not supervise the administrative functions of the commission. *Minneapolis, St. P. &c. R. Co. v. Railroad Comm. of Wisconsin*, 136 Wisconsin, 146, 169.

The commission act and the order complained of do not impair the alleged contract right of appellants to prescribe their own rates in Oregon. *Wells, Fargo & Co. v. Oregon Railroad & Navigation Co.*, 8 Sawy. 600; 15 Fed. Rep. 561; *State v. S. P. Co.*, 23 Oregon, 424, 432; *Ex parte Koehler*, 23 Fed. Rep. 529; *Portland Ry., L. & P. Co. v. Railroad Comm. of Oregon*, 56 Oregon, 468, 478, 479; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307; *Missouri P. R. Co. v. Kansas*, 216 U. S. 262.

The commission act does not violate the commerce clause of the Federal Constitution. *Oregon R. & Navigation Co. v. Campbell*, 173 Fed. Rep. 957; *People v. Draper*, 15 N. Y. 532, 543; *Thorpe v. Rutland & Burlington Railroad Co.*, 27 Vermont, 140, 142; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

The authority of the State over its internal commerce is sovereign.

Remote or indirect interference with interstate commerce by State is not inhibited by Federal Constitution.

Congress is without authority directly to regulate the purely internal commerce of the States. See authorities cited in brief in preceding case, p. 525, *ante*.

The Interstate Commerce Commission had declined to assume jurisdiction of commerce which begins and ends in a single State, even when it appeared that the local rates touched upon or interfered with interstate commerce. *Michigan Buggy Co. v. G. R. & I. Ry. Co.*, 15 I. C. C. Rep. 297; *Kurtz v. Pennsylvania Co.*, 16 I. C. C. Rep.

410; *Saunders & Co. v. Southern Express Co.*, 18 I. C. C. Rep. 415, 422; *Wells-Higman Co. v. Grand Rapids & I. Ry. Co.*, 19 I. C. C. Rep. 487, 490; *Hope Cotton Oil Co. v. T. P. R. Co.*, 12 I. C. C. Rep. 265, 269.

An allegation that a rate is unreasonable and if enforced will result in large loss of revenue is not admitted by demurrer. *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 401; *Central of Ga. Ry. Co. v. McLendon*, 157 Fed. Rep. 961, 977; *B., C. R. & N. Ry. Co. v. Dey*, 82 Iowa, 312, 343; *Missouri Pac. R. Co. v. Smith*, 60 Arkansas, 221; *Cincinnati & C. Packet Co. v. Catlettsburg*, 105 U. S. 559.

Where an order of the commission by its terms explicitly declared it referred only to intrastate commerce there is no presumption that the order constituted an unlawful interference with interstate commerce. *Railroad Commission v. Symms Grocer Co.*, 53 Kansas, 207, 216; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 339; *O. R. & N. Co. v. Campbell*, 173 Fed. Rep. 957; *Chicago, I. & L. R. Co. v. Railroad Commission*, 95 N. E. Rep. (Ind.) 364, 368; *New York Central & C. R. Co. v. Interstate Commerce Commission*, 168 Fed. Rep. 131; *Pittsburg & C. R. Co. v. Railroad Com.*, 171 Indiana, 189; *Chicago & C. R. Co. v. Railroad Com.*, 173 Indiana, 469; *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307.

The order complained of is a valid regulation of state rates only and does not constitute a burden upon interstate commerce. *Gulf, Col. & Santa Fe R. Co. v. Texas*, 204 U. S. 403; *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498; *Coe v. Errol*, 116 U. S. 517; *Morgan v. M., K. & T. Ry. Co.*, 12 I. C. C. Rep. 525, 528; *Montgomery Freight Bureau v. Western Ry. of Alabama*, 14 I. C. C. Rep. 150; *Marshall Oil Co. v. Chicago & N. W. R. Co.*, 14 I. C. C. Rep. 210; *Kurtz v. Pennsylvania Co.*, 16 I. C. C. Rep. 410, 412, 413; *Dobbs v. Louisville & N. R. Co.*, 18 I. C. C. Rep. 210; *Wabash, St. Louis & Pacific R. Co. v. Illinois*, 118 U. S.

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557; *General Oil Co. v. Crain*, 209 U. S. 211, 228, 229; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 509; *Southern R. Co. v. Hunt*, 42 Ind. App. 90.

A carrier using a local rate as part of a through interstate rate does so knowing it to be subject to state control. *Reagan v. Mercantile Trust Co.*, 154 U. S. 413; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. 466; *Ames v. Union Pacific Railroad Company*, 64 Fed. Rep. 165; *Armour Packing Company v. United States*, 209 U. S. 56, 82.

A rate is a definite charge for a whole service. *Beale & Wyman*, Railroad Rate Regulation, § 661.

The control of intrastate rates by the State may not be defeated by the carrier's expedient of using a local rate as one of the factors in framing an interstate rate. *Trammel v. Clyde Steamship Company*, 4 I. C. C. Rep. 120, 139; *Wells-Higman Company v. Grand Rapids & Indiana Railway Co.*, 19 I. C. C. Rep. 487; *Dobbs v. L. & N. R. Co.*, 18 I. C. C. Rep. 210; *Wabash, St. Louis & P. R. Co. v. Illinois*, 118 U. S. 557; *Gulf, Colorado & Santa Fe Railroad Company v. Texas*, 204 U. S. 403; *General Oil Co. v. Crain*, 209 U. S. 211; *Ames v. Union Pacific R. Co.*, 64 Fed. Rep. 165, 171; *St. Louis & S. F. R. Co. v. Hadley*, 168 Fed. Rep. 317; *Southern Ry. Co. v. Hunt*, 42 Ind. App. 90; *State v. Missouri Pac. Ry. Co.*, 76 Kansas, 467; *Morgan v. M., K. & T. Ry. Co.*, 12 I. C. C. Rep. 525, 528; *Lincoln Commercial Club, v. C., R. I. & P. R. Co.*, 13 I. C. C. Rep. 319; *Montgomery Freight Bureau v. Western Ry. of Ala.*, 14 I. C. C. Rep. 150; *Marshall Oil Co. v. C. & N. W. Ry. Co.*, 14 I. C. C. Rep. 210; *Woodside v. Tonopah & G. R. Co.*, 184 Fed. Rep. 360; *Oregon R. & N. Co. v. Campbell*, 173 Fed. Rep. 957, 982; *Missouri Pac. R. Co. v. Kansas*, 216 U. S. 262, 283; *Louisville & N. R. Co. v. Siler*, 186 Fed. Rep. 176, 200; *Arkansas Rate Cases*, 187 Fed. Rep. 290, 302; *Gibbons v. Ogden*, 6 Wheat. 448; *Employers' Liability Cases*, 207 U. S. 463, 493; *Addyston Pipe & Steel Co. v.*

United States, 175 U. S. 211, 231; *State v. Northern Pacific Ry. Co.*, 120 N. W. Rep. (N. D.) 869; *Northern Pac. Ry. Co. v. North Dakota*, 216 U. S. 579; *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503; *Perkins v. Northern Pacific R. Co.*, 155 Fed. Rep. 453; *Shepard v. Northern Pac. Ry. Co.*, 184 Fed. Rep. 765.

General allegations in a bill of the unreasonableness and confiscatory character of rates established by order of the commission are but conclusions of law and are not sufficient to raise an issue. *Central of Ga. R. Co. v. Mc-Lendon*, 157 Fed. Rep. 961.

A reduction in rates does not necessarily decrease earnings. *Willcox v. Cons. Gas Co.*, 212 U. S. 19, 51; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 18; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339.

The public does not guarantee that every investment made by a railroad shall be profitable. *Matthews v. Board of Corp. Comm.*, 106 Fed. Rep. 7, 9, 10; *Steenerson v. Great Northern R. Co.*, 69 Minnesota, 353.

There is no particular rate of compensation which must in all cases be regarded as sufficient for capital invested in business enterprises. *Willcox v. Cons. Gas Co.*, 212 U. S. 19, 50; *San Diego Land Co. v. National City*, 174 U. S. 739, 757.

A carrier's property as a unit has one value, which in any consideration of the question of confiscation is to be divided equitably into the value of the property for the interstate use to which it is put and to the state use. *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 175.

Allegations that a rate is unreasonable and if enforced will result in large loss of revenue are not admitted by demurrer. *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 401; *Mo. Pac. R. Co. v. Smith*, 60 Arkansas, 221; *So. Pac. Co. v. Int. Comm. Comm.*, 177 Fed. Rep. 963; *B., C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 343; *Quimby v. Clyde S. S. Co.*, 12 I. C. C. 392, 396; *Brewer v. Louisville & N. R. Co.*,

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7 I. C. C. 227, 238; *Central of Ga. R. Co. v. McLendon*, 157 Fed. Rep. 961, 978.

A reasonable actual trial is the test of the confiscatory character of rates. *Ex parte Young*, 209 U. S. 123; *Knoxville Water and Consolidated Gas Cases*, *supra*.

Confiscation cannot be predicated of a single rate or group of rates, but must be judged from the effect on the entire business done within the State. *Willcox v. Cons. Gas Co.*, 212 U. S. 19; *Atlantic Coast Line R. Co. v. North Carolina Corp. Comm.*, 206 U. S. 1; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 665; *Southern Railway Co. v. Atlanta Stove Co.*, 128 Georgia, 207, 233, 234; *Wisconsin &c. R. Co. v. Jacobson*, 71 Minnesota, 519; 179 U. S. 287, 302; *State v. Missouri Pac. R. Co.*, 76 Kansas, 467; *Pensacola &c. R. Co. v. Florida*, 25 Florida, 310; *Morgan's R. Co. v. Railroad Comm.*, 109 Louisiana, 247; *People v. Railroad Co.*, 176 Illinois, 512; *Chicago Union Traction Co. v. Chicago*, 199 Illinois, 579; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 412; *Smyth v. Ames*, 169 U. S. 466, 544, 547; *San Diego Land Co. v. National City*, 174 U. S. 739; *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U. S. 578, 596, 597; *Jerome Hill Cotton Co. v. M., K. & T. Ry. Co.*, 6 I. C. C. 601; *So. Pac. Co. v. Bartine*, 170 Fed. Rep. 725; *Noyes, Amer. Railroad Rates*, 25.

Reasonable rates may be unjustly discriminatory or unlawfully preferential. *Beale & Wyman, Railroad Rate Regulation*, §§ 724, 839; *Int. Comm. Comm. v. Cincinnati &c. Ry. Co.*, 167 U. S. 479, 511; *Kinnavey v. T. Ry. Assn.*, 81 Fed. Rep. 802, 804; *Board of Trade v. Ry. Co.*, 6 I. C. C. 632, 645; *Portland R. L. & P. Co. v. Railroad Comm. of Oregon*, 56 Oregon, 468, 484; *Portland R. L. & P. Co. v. Railroad Comm. of Oregon*, 109 Pac. Rep. 274.

The scale adopted by the commission in its order has been employed in numerous cases. *Portland Chamber of Commerce v. Oregon R. & N. Co.*, 21 I. C. C. Rep. 640; *City*

of *Spokane v. Northern Pacific Railway Co.*, 15 I. C. C. Rep. 376; *Traffic Bureau of The Merchants' Exchange v. So. Pac. Co.*, 19 I. C. C. Rep. 259; *Commercial Club of Salt Lake v. A., T. & S. F. Ry. Co.*, 19 I. C. C. Rep. 218.

The test of the reasonableness of a rate is not the amount of profit in the business of a shipper, but whether the rate yields a reasonable compensation for the service rendered. *Smyth v. Ames*, 169 U. S. 466; *C. & N. W. R. Co. v. Osborne*, 52 Fed. Rep. 914.

Under the law the commission's order is *prima facie* lawful and reasonable. *Atlantic Coast Line R. Co. v. Florida*, 203 U. S. 256; *Steenerson v. Great Northern R. Co.*, 69 Minnesota, 353; *Int. Comm. Comm. v. Louisville & N. R. Co.*, 118 Fed. Rep. 616; *Cumberland &c. Co. v. Railroad Comm.*, 156 Fed. Rep. 834, 837; *Railroad Comm. v. Cumberland &c. Co.*, 212 U. S. 414, 422; *Railroad Tax Cases*, 92 U. S. 575; *State v. Savage*, 65 Nebraska, 714, 768, 769; *In re Cruger*, 84 N. Y. 619, 621; *San Jose Gas Co. v. January*, 57 California, 614, 616; *Chicago, B. & Q. R. Co. v. Babcock*, 204 U. S. 585, 598; *State v. Houser*, 122 Wisconsin, 534, 570; *Int. Comm. Comm. v. L. & N. R. Co.*, 102 Fed. Rep. 709.

The return from the whole line must be considered. *Portland Ry., L. & P. Co. v. Railroad Comm. of Oregon*, 56 Oregon, 468, 482; *Int. Comm. Comm. v. Louisville & N. R. Co.*, 118 Fed. Rep. 613; *Traffic Bureau of Merchants' Exchange v. S. P. Co.*, 19 I. C. C. 261; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 665, 666.

Findings of fact made by the Interstate Commerce Commission as to preferences and discriminations in railway rates are beyond the competency of the courts to re-examine. *Baltimore & O. R. Co. v. United States*, 215 U. S. 481; *Illinois C. R. Co. v. Int. Comm. Comm.*, 206 U. S. 441; *Int. Comm. Comm. v. Delaware, L. & W. R. Co.*, 220 U. S. 235.

A carrier may complain of a reduction of rates by the

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commission so far as it affects its revenues, but cannot complain that discrimination results to shippers or trade centers from such reduction. *Int. Comm. Comm. v. C., R. I. & P. R. Co.*, 218 U. S. 88, 109; *Clark v. Kansas City*, 176 U. S. 114, 118; *Smiley v. Kansas*, 196 U. S. 447.

MR. JUSTICE HUGHES delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court entered July 18, 1911, dismissing the bill, on demurrer, for want of equity. 189 Fed. Rep. 182.

The bill was filed by the complainants, the Southern Pacific Company and the Oregon & California Railroad Company, to set aside an order made by the Railroad Commission of Oregon under date of September 21, 1910, and to enjoin the defendants, the members of the commission and the Attorney-General of the State, from enforcing it. By this order, the commission found, after hearing, that certain freight rates maintained by the Southern Pacific Company between Portland and other places on its lines in Oregon were unreasonable, excessive and discriminatory, and the commission required the company, in lieu of the rates thus disapproved, to put into effect the "just and reasonable and non-discriminatory charges" set forth in the order.

The first, and principal, contention of the appellants, is that this requirement was invalid as constituting a regulation of interstate commerce. The order, however, related solely to intrastate traffic, and the question raised by the bill, so far as its allegations bear upon the conditions of interstate transportation, does not differ in its essential features from that which was passed upon in the Minnesota rate cases. *Minnesota Rate Cases*, ante, p. 352. This objection to the order cannot be sustained.

It is further insisted that the order was confiscatory.

The railroad property in question was that of the Oregon & California Railroad Company which was operated by the Southern Pacific Company under lease made in 1887. It was provided by the lease that the Southern Pacific Company should keep the property in good condition, "operate, maintain, add to, and better the same at its own expense," and should pay over annually to the lessor company the amount remaining of the net earnings, after all charges and expenses incurred by the Southern Pacific Company under the lease, and all taxes and interest, current fixed charges and all indebtedness of the lessor to the Southern Pacific Company, had been paid, save that if such amount should exceed specified percentages of the preferred and common stock of the lessor, the excess might be retained by the lessee.

It was alleged that after payment of operating expenses, taxes, interest, and other reasonable and legitimate expenses, a deficit had accumulated representing an indebtedness to the Southern Pacific Company and amounting on June 30, 1906, to the sum of \$6,222,037; but it also appeared that this deficit was reduced in the following years so that on June 30, 1909, it amounted to \$3,207,008.37.

The capital stock consisted of preferred stock of the par value of \$12,000,000, and common stock of the par value of \$7,000,000, and the bonded indebtedness amounted to \$17,745,000, making in the aggregate \$36,745,000. In one part of the bill it was alleged, without particulars showing the constituent items, that the total value of the property in Oregon, held under the lease, consisting of approximately 670 miles of road with rolling stock, stations, terminals and appurtenances, amounted to \$43,594,886.73. But a later averment, in connection with the allegations as to outlays and return, was that "the properties of the Oregon & California Railroad Company are of the reasonable value of a sum representing the out-

standing bonded indebtedness and the deficit, as aforesaid and the capital stock of the company"; and so valued, the total would be \$39,952,008.37.

The receipts from the entire property and the disbursements for several years were stated. It was averred that for the fiscal year ending June 30, 1909, the total receipts were \$7,104,081 and the disbursements, \$5,839,698. As the court below pointed out, the bill was silent as to what was embraced in the aggregate expenditures, and the court thought it fair to assume that the total disbursements, as alleged, included not only the expenses of operation, but also interest on bonds and on open accounts and thus, that the averment showed, for the fiscal year ending June 30, 1909, a net balance of \$1,264,383 as a return on the investment represented by \$19,000,000 in par value of capital stock. It was alleged that the "annual loss of interstate and intrastate business combined," which would result if the order in question were enforced, would amount to \$156,072.48. The court below concluded that on this showing it could not be said in advance of actual experience, that the rates fixed by the commission would not afford a fair return upon the value of the property.

The order, as already noted, was made in September, 1910, and the bill was brought in October, 1910, but the receipts and disbursements for the fiscal year ending June 30, 1910, were not given. In addition to this omission, the bill was destitute of any allegation showing the expenses incurred in the conduct of the intrastate business as distinguished from the interstate business, or the share of the value of the property which was assignable to the former. In short, the allegations of the bill were wholly insufficient to show that the complainants would be deprived of just compensation in their business of intrastate transportation by virtue of the operation of the order.

In sustaining the demurrer, the court gave to the com-

plainants thirty days in which to plead further; and they thus had opportunity for amending their bill so as to present additional averments which would correct deficiencies in the original allegations and remove any possible misapprehension as to the facts intended to be set forth. But the complainants informed the court that they did not desire to avail themselves of this opportunity and accordingly the bill was dismissed. We think that it cannot be said that any error was committed in thus disposing of the contention as to confiscation.

It is also urged that the railroad commission act of Oregon (February 18, 1907 Laws of 1907, chap. 53, p. 67), and the order in question, were void as against the Oregon & California Railroad Company, and the lessee of its property, upon the ground that the act and order impaired the obligation of the contract contained in the charter of the first-mentioned company. That company was incorporated in 1870, under the general incorporation act of Oregon, approved October 14, 1862, which, in § 34, provided: "Every corporation formed under this act for the construction of a railroad, as to such road shall be deemed common carriers, and shall have power to collect and receive such tolls or freight for transportation of persons or property thereon as it may prescribe." Reference is also made to the following provision of the constitution of Oregon pursuant to which this incorporation act was enacted: "Corporations may be formed under general laws, but shall not be created by special laws except for municipal purposes. All laws passed pursuant to this section may be altered, amended or repealed but not so as to alter or destroy any vested corporate rights." (Art. XI, § 2.) The sole question presented on this branch of the case, it is said by counsel for the appellants, "is whether the judgment of the carrier in fixing rates for transportation of persons or property shall be supervised,

regulated and supplanted by the judgment of the State exercised through a Railroad Commission, or shall it remain as it was at common law, within the exclusive power and jurisdiction of the carrier to fix these rates, subject only to the power of the courts upon judicial inquiry, to denounce and decline to enforce rates that are excessive and unreasonable?"

As to this question, it is sufficient to say that it is well established that a general charter provision such as the one quoted, giving power to charge and collect tolls, necessarily implies that the charges shall be reasonable and does not detract from the power of the State through its legislature, or the agency lawfully constituted thereby, to prescribe reasonable rates to be observed by the carrier. *State v. Southern Pacific Co.*, 23 Oregon, 424, 432, 433; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 330; *Dow v. Beidelman*, 125 U. S. 680, 688; *Georgia R. R. & Banking Co. v. Smith*, 128 U. S. 174, 181; *Chicago, M. & St. P. Railway Co. v. Minnesota*, 134 U. S. 418, 455; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 215; *Louisville & Nashville Railroad v. Kentucky*, 161 U. S. 677, 696; *Owensboro v. Owensboro Waterworks Co.*, 191 U. S. 358, 370. In the case of *Stone v. Farmers' Loan & Trust Co.*, *supra*, where the charter empowered the railroad company "from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation of persons or property on their railroad," and it was insisted that a subsequent statute creating a railroad commission with authority to fix maximum rates was an impairment of contract obligation, the court said (p. 330): "The claim now is that by § 12" (the provision referred to) "the State has surrendered the power to fix a maximum for this company, and has declared that the courts shall be left to determine what is reasonable, free of all legislative control. We see no evidence of any such intention. Power is granted to fix reasonable charges,

but what shall be deemed reasonable in law is nowhere indicated. . . . Consequently, all the power which the State had in the matter before the charter it retained afterwards. The power to charge being coupled with the condition that the charge shall be reasonable, the State is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered."

The remaining questions may be briefly disposed of. The complainants were not entitled to have the court below substitute its judgment for that of the commission or determine the matters which properly fell within the province of that body. The conditions of traffic, the adjustment of rates with respect to the different commodities transported, and the appropriate basis for classification, were subjects for the consideration of the commission, and there was nothing shown which would have warranted the court in overriding the decision of the commission upon the ground that its action was of such an arbitrary character as to constitute an abuse of power.

The criticism made in the bill that the railroad commission act violated the state constitution in conferring upon the commission authority to exercise legislative, executive and judicial powers, has been answered by the decision of the state court, sustaining the statute. *State v. Corvallis & Eastern R. R. Co.*, 59 Oregon, 450; 117 Pac. Rep. 980. The provision of the statute that suit might be brought in the state court to set aside orders of the commission upon the ground that the rates fixed were unlawful, or that the regulation or practice prescribed was unreasonable, did not infringe the rights of the complainants. The procedure permitted by the statute is consistent with the Fourteenth Amendment. *Portland*